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Supreme Court of the United States

October Term, 1970

NO. 1573

[redacted],

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

Petition for a Writ of Certiorari
to the Court of Special Appeals of
State of Maryland

JOHN D. [redacted]
[redacted]
[redacted]
[redacted]

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IN THE

Supreme Court of the United States

October Term, 1970

NO. _____

SIDNEY GERSTEIN,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

Petition for a Writ of Certiorari to the Court of Special Appeals of the State of Maryland

Petitioner, Sidney Gerstein, prays a Writ of *Certiorari* issue to review the judgments, orders and opinions of the Court of Special Appeals of the State of Maryland in the

above-entitled case terminated in Maryland on January 13, 1971 with an order denying intrastate *certiorari* review.

OPINIONS BELOW

The order of the Court of Appeals of the State of Maryland is an unreported, silent opinion cited in the Miscellaneous Docket, Number 271, September Term, 1970 (Hammond, C.J.) denying review of the adverse opinion of the Court of Special Appeals of the State of Maryland in Appeal Number 41, September Term, 1970 (Orth, J.) reported in 10 Maryland Appellate Reports 322, 270 Atlantic Second Reports 331, both set out as Appendix exhibits F and E, pp. 25, 13 *infra.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code 1257, since rights, privileges and immunities are claimed under the Constitution of the United States (June 25, 1948, Chapter 646, Statute 929).

(First, Fourth, Fifth, Sixth and Fourteenth Amendments, U.S. Constitution; *Barron, use of Tiernan v. Baltimore,* 32 U.S. 243, 7 Pet. 243; *Smith v. Maryland,* 59 U.S. 71, 18 How. 17; *Jones v. U.S.,* 357 U.S. 493; *Mapp v. Ohio,* 367 U.S. 643; *Stoner v. California,* 376 U.S. 483; *Bumper v. North Carolina,* 391 U.S. 543)

QUESTIONS PRESENTED

1. Is not the Fourth Amendment violated when a citizen is deprived of property, a sophisticated

electronic-communications invention, by a State criminal statute, enacted after the invention is made public by patent application, which classes the antecedent invention as contraband subject to suppression and destruction; and, its owner subject of imprisonment and fine?

2. Is not the Sixth Amendment violated when courts deny a citizen his statutory right to a preliminary hearing at which he can confront witnesses against him and, with the aid of counsel, challenge them and tangible evidence seized under warrant secured by government chicane and subterfuge?

3. Is not the Fifth, Sixth and Fourteenth Amendments violated when an accused is forced to immediate trail by a Court over objection that his counsel has not has sufficient time to prepare an adequate defense in a lengthy, complex jury trial involving use of a sophisticated electronic device then under patent-pending classification?

4. Is an accused denied Fifth and Fourteenth Amendment due process of law, fair trial and adequate appellate review when adverse ruling brought by Court-counsel personality conflicts redound to his prejudice and result in conviction and affirmation of conviction?

5. Is an accused denied constitutional rights to an adequate defense when the courts hold to strict interpretation of procedural rules and thereby prohibit him from presenting exculpatory evidence in his own behalf?

6. Is a Maryland accused denied constitutional rights under state rulings prohibiting inquiry of the eracity of an affiant in a search warrant application?

STATEMENT OF THE CASE

Petitioner was found guilty on December 12, 1969, after a four-day jury trial in the Criminal Court of Baltimore (Prendergast, J.) under Indictment Number 7951-7955 (defrauding the telephone utility of $2.91); Indictment Number 7952-7956 (defrauding the telephone company); Indictment Number 7954 (conspiracy to defraud the telephone utility) of the September Term, Docket of 1968; and, under Indictment Number 3209 with *addendum* (lottery law violation) of the January Term, Docket of 1969. He was sentenced to a total four-year prison term, fined $2,000.00, ordered to pay $3,363.50 in Court costs and was released on appeal bail double the pre-trial bail of $10,000.00. An additional $10,000.00 bond was ordered for bail release pending intrastate *certiorari* petition on condition that fine and Court costs be paid before release. He was refused bail while petitioning this Court for review and was incarcerated in the Maryland House of Correction at Jessup, Maryland.

STATEMENT OF THE FACTS

Petitioner is an inventor of the "Device For Automatically Diverting Telephone Calls" (Patent Number 3445604) and the "Semi-Automatic Diverter for Telephone Calls" (Patent Number 3506792) (1) developed in an

(1) Petitioner originated the device in 1964 and formed a partnership on November 3, 1964, which was later incorporated on August 5, 1965. On December 4, 1964, Denton and Perry, patent attorneys, Munsey Building, Washington, D.C., were retained to search the invention. Application for patent with specifications was filed with U.S. Patent Office which granted Patent Pending Classification Number 474-415 on March 10, 1965 for the telephone diverter. (R:T-351-2).

electronic-communications laboratory on the first floor of his father's grocery store at 2300 Barclay Street in Baltimore City.

The Gerstein Grocery was one of several hundred stores ransacked by rampaging crowds during riots in Baltimore in 1968. The grocery was closed and boarded up. A former second floor tenant, Henry Bailey, continued to occupy his apartment and was a listed telephone subscriber (G:T, 369-70; T. 190). He and Petitioner had access to the building where Petitioner continued experiments in his laboratory. His invention was kept locked in a suitcase placed on a third shelf of the laboratory.

During preceeding years, police suspected lottery operations were conducted in the grocery and Petitioner had

Shortly thereafter, a bill was introduced in the Maryland Legislature and enacted into law as criminal statute Article 27, Section 557A, Annotated Code of Maryland (Appendix D, *infra*) effective June 1, 1965. The statute specifically spells out the theory and purpose of the Gerstein Diverter. The statute subjects any inventor, owner, user or others to prison and fine and makes all future private communications-connected inventions contraband subject to suppression and destruction by order of Court.

On June 21, 1966, Petitioner requested the Maryland Public Service Commission for permission to market the patent-pending device in business and industrial locations (Case Number 60-53). A hearing of November 9, 1966, resulted in an abeyance ruling until patent issued. The hearing was attended by opposition witnesses Charles Schultz (R:T-502), engineering specialist of the Bell Telephone System Research Laboratory at Holmdel, New Jersey, and other scientist employees of the American Telephone and Telegraph Corporation and the Chesapeake Potomac Telephone Company of Maryland.

Patent Number 3445604 was granted on May 20, 1969, with Patent Number 3506792 issuing on April 14, 1970.

been found guilty once of a lottery slip possession. In a 1967 raid, the search warrant was quashed in the Criminal Court of Baltimore when the Court discovered the warrant issued for the entire building and did not mention Mr. Bailey as tenant when simple investigation would reveal the building was a multiple dwelling.

Prior to December 5, 1968, "after receiving a complaint that criminal activities are being conducted" (inquiry of which was prohibited by the Trial Court) (G:T-90-92), Police Lieutenant Robert McKay, who had conducted 1962 and 1967 raids and knew Mr. Bailey was in residence (G:T-188), delegated Detective Thomas J. Alston to observe the boarded-up building. His observations resulted in the contested affidavit-application-search warrant (Appendices B and C, *infra*), and supplied a "just enough" probable cause to influence a non-suspecting judge to issue a search warrant. The warrant was identical to that rejected by the Court as unreasonable the year before because it called for search of the entire premises.

On December 13, 1968, at 1:45 p.m., Alston with 10 other policemen, with one announcement, sledged-hammered down two door entries to the grocery and scattered throughout the entire building. Within minutes, the police were joined by Chesapeake and Potomac Telephone Company technicians who began inspecting all wiring in the building.

Petitioner was found on basement exit stairs bleeding profusely from the forehead which he had struck against a steel girder as he ran from his laboratory to seek safety after he heard the sledge hammers smashing down the outer doors. Police displayed the search warrant (G:T-204), called for an

ambulance and continued to search the premises. Petitioner attempted to dismantle certain wiring but was restrained. Upon release from the hospital, he posted cash collateral required for release before preliminary hearing and was taken home. No preliminary hearing was had and Petitioner, some time later, was presented and indicted by the Grand Jury which heard non-contested evidence from the police.

The raiders found a table in the basement upon which was a telephone connected to two black boxes, lottery tabulations and tape recordings. Police found the Bailey telephone (Mr. Bailey was not at home and later was found not guilty or dismissed as a co-defendant) with an extension to the basement telephone which also was connected to a street pay phone booth outside the grocery. The Gerstein invention, which was not in use, was taken from its laboratory shelf and seized under the warrant. (G:T, 358-61; T, 419-423).

Lieutenant McKay turned the locked suit case with invention over to an assistant prosecutor who gave it to Charles H. Rouse, the Chesapeake and Potomac Telephone Company security officer, who, in turn, sent it to Mr. Schultz at the Bell Research Laboratory in New Jersey where it remained until trial as a "uninspected museum piece". (G:T-509; T-421: T. 486-493)

(Before trial Mr. Schulz wired the courtroom and as State's witness demonstrated the Gerstein invention to jurors labeling it device proscribed by the criminal statute. The black boxes were never demonstrated. Petitioner did not testify.)

Pre-trial and trial motions, rulings, opinions and orders present a multitude of interconnected complexities which

require close scrutiny and disection before any sembelance of order can evolve. The trial record alone contains 705 pages of testimony, 33 exhibits, the affidavit-warrant and myriad motions filed between January 9, 1969 and verdict of January 15, 1970 by antecedent and present counsel before two judges of the Criminal Court (Appendix A, Docket Entries, *infra*).

Petitioner retained Frank S. Brocato, Esquire, as defense counsel, who filed motions to ascertain if the telephone utility, without Court order, used its facilities to intercept or eavesdrop at 2300 Barclay Street, and become the undisclosed "tipster" or police informant which resulted in the Alston assignment to get a "just enough" affidavit for a search. The motions for disclosure of informer and witnesses and for particulars were overruled (Harris, J.). Other critical motions were withdrawn by Mr. Brocato who entered a *nolo contendere* plea to the indictment charging illegal use of telephone devices (Article 27, Section 557A, *supra*).

Petitioner discharged his counsel, retracted the *nolo contendere* plea being held *sub curia* and was ordered, on November 13, 1969, to secure new counsel for trial to be held by December 1, 1969, by Judge Harris, who disqualified himself from further proceedings. New counsel, David S. Harris, Esquire, was retained on November 30, 1969 and filed motions to stay proceedings before Judge Prendergast, then sitting as stated judge in the so-called "Organized Crime courtroom" in which only narcotics and gambling cases were heard. Mr. Harris asked the stay to permit the statutory preliminary hearing to be held (Appendix D, Article 26, Section 115, *infra*) and to allow him time to prepare a defense in a complex and already complicated case. The motions were denied.

On December 9, 1969, Mr. Harris and A. David Gomborov, Esquire, resubmitted motions to stay for purposes of preparation, to challenge evidence at preliminary hearing, and, to submit other necessary motions. All motions were denied and the Court, ordering immediate trial, summoned a jury venire to be brought to the courtroom. Defense counsel, in haste, xeroxed the earlier Brocato motions with name change and submitted them for rulings.

The Trial Court insisted that new counsel were not entering new motions but adopting antecedent counsel motions, and by such adoption, also adopted prior Court rulings on the motions and tactics employed by antecedent counsel in the withdrawal of his motions. The Court then ruled the submitted motions for discovery of telephone interception and discovery in general came too late because veniremen were entering the courtroom. The Court ordered trial to begin instanter commenting:

> "Why can't defense counsel prepare a case in two weeks? . . . I don't look upon that (the motions) with any sympathy . . . I have tried cases very few out of the tens of thousands of cases that took more than two weeks to prepare . . . If you can't prepare these cases in twenty days, I doubt you'll ever be prepared." (G:T. 16, 20, 21, 24)

In challenge to the veracity of the affiant information, the Court waived restrictive State case ruling and permitted inquiry as to falsehood; but, then refused the defense time to produce rebuttal-alibi witnesses and ruled the warrant admissible (G:T. 48-49; T. 106-109; T. 224). Later, the Court called recesses to permit the State to locate and produce witnesses, admonished the prosecutor not to conclude questioning and instructed the prosecutor on the methods of presenting evidence (G:T. 250-252; 259, 221).

On appeal, defense counsel were permitted to exceed the 25-page criminal appellate brief limit in Maryland and presented this most complex case in 39 pages which the opinion judge labeled prolix. For brevity, and to look at the "totality of the trial atmosphere", the Appellant Brief coupled argument on constitutional violations of right to effective counsel; the minimum needs subterfuge affidavit; the legality of arrest, search and seizure; want of conspiracy; use of the invention in evidence and other trial defects under a general question, "Did the Trial Court Commit Reversible Error?" (*Coleman v. Alabama*, 90 S. Ct. 1999, had not been decided upon submission of opposing briefs but was the subject of a heated non-recorded oral appellate argument).

The first paragraph of the affirming opinion (Appendix E, *infra*) reflects a continuation of the personality clashes and the impatience of the appellate jurist who, perhaps concerned more with guilt or innocence, failed to address himself to the constitutional issues presented for review. The critical questions asked remain unanswered by an appellate tribunal.

Petitioner asks review of the totality of the circumstances in that each part is so interlocked as to preclude examination of the several parts to reach a valid conclusion. At bar is not a case which can be presented by specific questions (Appendix E, Opinion, p. 13) or individual contentions because the whole cannot be found in the sum of its parts as presented, or prohibited from being presented, at the courts below.

The underlying episylogistic factors show intrigants initiated a scheme to eliminate an economic threat and continued underhanded machinations with police to effect convictions necessary for the cabalists' success. If this be true,

then the American constitutional concept of fundamental fairness has been outrageously outraged. Petitioner, seeking after fundamental justice, perforce must present his complaint in segments by proffering these

REASONS FOR GRANTING THE WRIT

1. *Certiorari* should be granted to determine if a belated criminal statute can be used to outlaw and antecedent invention and subject its designer to fine and imprisonment and the invention itself to suppression and destruction.

During 1962-1964, a private electronic scientist, in his small laboratory, evolved a theory in telephonics and created a device not yet envisioned by skilled utility researchers. In 1964, patent attorneys, after search, applied for patent for the device and submitted requisite specifications to the U. S. Patent Office which granted the machine patent-pending status on March 19, 1965. The device, if marketed, could be used in all businesses, industrial plants, and government offices to transmit intramural telephone messages and also be connected to AT&T facilities to permit intramural telephonic communications. With such device in use, the utility could not levy monthly charges for every use of a telephone and, consequently, the huge utility could lose income and profits now enjoyed in its government-endorsed monopolistic enterprises.

The Gerstein Diverter, upon filing for patent, became known to telephone scientists. In 1965,a bill was presented by lobbyists to the Maryland Legislature and, in due course, became criminal statute, Article 27, Section 557 A (Appendix D, *infra*) effective June 1, 1965. The bill came three months too late . . . or the Patent Office acted three months too soon. The

"editor's note" in the statute refers to the non-applicability of the statute to any case pending on June 1, 1965 as to Section 2, which details the theory of the Gerstein Diverter. The Maryland Public Service Commission in 1966, having heard opposition testimony from AT&T witnesses, compromised the issue and held use of the Gerstein Diverter in abeyance until patent issued, (*supra*).

The Gerstein Grocery had been suspect by Baltimore police as a lottery location. Petitioner's "cheesebox" was suspect as a tool in lottery operations. Petitioner was known to have his laboratory in his father's store which police knew or with reasonable diligence should have known, was a multiple dwelling listed in land records since 1962 as a life estate of Solomon Gerstein with remainder over in fee to Rose Hammenbaum (G:T. 587). Police had lost a conviction a year before because Henry Bailey's apartment had been invaded under a search warrant issued for the "entire premises of 2300 Barclay Street."

Recent decisions of this Court demanded the identity of an informer be disclosed or the reliability of the informer and the underlying circumstances of the reliable informer's information be shown for a warrant issue. (*Aguilar v. Texas*, 378 U.S. 108; *Spinelli v. U.S.*, 391 U.S. 933; *Stanford v. Texas*, 379 U.S. 476; and *U. S. v. Ventresca*, 380 U.S. 102). Yet, Maryland's new Court of Special Appeals had embraced the "four corners" concept of the affidavit for search warrant and prohibited later attack on the veracity of the affiant leaving recourse to the searched to prosecution of the affiant for perjury (*Sessoms v. State*, 3 Md. App. 118; *Smith v. State*, 191 Md. 329, cert. den. 336 U.S. 925, *Scarborough v. State*, 3 Md. App. 208, *Tischler v. State*, 206 Md. 386).

Police Lieutenant Andrew of the lottery squad received a called "complaint" at his home that "criminal activities relating to lottery are being conducted in the building at 2300 Barclay Street"(G:T. 90-98).The complainant is not disclosed nor is the "information received" disclosed. Yet a telephone search is "begun" (?) to find an unlisted number registered to Mr. Bailey. This is gotten from the Chesapeake & Potomac Telephone Company security officer, Charles H. Rouse, with whom Lieutenants McKay and Andrew are in constant contact (G:T. 409). A detective is assigned to watch the Gerstein Grocery building and report his observations concerning lottery. He makes out his minimum observation-traffic-"overheard conversation" affidavit, which is or is not reviewed by Lieutenant McKay (G:T. 90-98) which is then presented to a judge for warrant issuance.

This subterfuge affidavit did not include, as fundamental fairness would ordain, the "information received", the "tipster", his reliability or the underlying circumstances of wiretap by the utility, which has the capacity to so do (G:T. 545), with or without order of Court, the ownership of the building or its status as a multiple dwelling, known to police, or the unlisted Bailey telephone or other factors incident to establishing probable cause.

Raiders with sledgehammers attacked the building "five seconds" after saying the words "this is the police with a warrant" and raced through the entire building. Close at their heels are C&P Telephone Company technicians and Mr. Rouse. They find some black boxes attached to a telephone in the basement, trespass into the Bailey apartment and used the Bailey telephone to find it is connected to the basement phone which, in turn, is attached to a street pay booth phone. They enter the inventor's laboratory and find the invention locked in

a suitcase on a top shelf and seize it under the blanket authority of "other lottery paraphernalia." No electronic tools or other items are taken from the laboratory

The invention, now State property as contraband, is given to State's Attorney Ozer who gives it to Mr. Rouse, who sends it to the Bell System Research Laboratory in New Jersey to Mr. Schulz who, after months of possession, wires the trial courtroom and, as State's witness, demonstrates how the Gerstein invention functions in violation of Article 27, Section 557A. Admittedly not in use when seized, the invention is used as evidence, over objection, to prove Indictment Number 7951 and 7955 (Article 27, Section 194A) and Indictment Numbers 7952 and 7956 (Article 27, Section 557A). The black boxes were not demonstrated or shown to be operative devices used to violate the statutes.

Petitioner was forced to trial, to hire counsel, convicted, released on double bail pending appeal, released on increased bail and condition of paying fines and Court costs pending intrastate *certiorari* and jailed without bail pending submission of this petition for writ. (*Hudson v. Parker,* 156 U.S. 277, 15 S. Ct. 450, 8 Corpus Juris Secundum 36 (10); Federal District Judges Conference Report, Comp. St. Ann. Supp. 1123, Section 1113 (a)).

Petitioner's first counsel's motion for discovery of illegal telephone interception/eavesdropping and disclosure of informer witnesses were overruled. Motions for stay for statutory preliminary hearing and for new counsel preparation (*infra*) was summarily overruled and time was not granted to defense to produce rebuttal witnesses at to the affiant veracity.

The Maryland Court of Special Appeals (Appendix E, Opinion, *infra*) in a peripheral review of the issues (*Beck v. Ohio,* 379 U.S. 89; Packer, *Two Models of the Criminal Process,* 133 U. of Penn. L. R. 1 (1964) found a preliminary hearing to be unnecessary (*infra*) and, under "Evidence Seized" labored to say that the invention, proscribed by Article 27, Section 557A, could be classed as a "nexus" between "other paraphernalia" and criminal behavior. If so then, the licensed amateur short-wave radio operator could be found guilty of espionage because a short-wave radio could provide the "nexus" in a crime of espionage though such radio be inoperative or never used in the charged espionage.

The basement telephone devices were exhibited but were not demonstrated and no proof of defrauding the utility of $1.30 and $1.61 by Petitioner was shown even *prima facie,* let alone beyond the reasonable doubt, under Article 27, Section 194A. The conviction was clear error and the question was not discussed by the appellate courts below.

Petitioner was convicted of possession of his patent-pending invention when he was exempt under the belated criminal statute from such possession as a case pending before the statute became effective. Being exempt, his conviction is clear error under Indictments Number 7952 and 7956. The statute itself raises the question of constitutionality in that it imposes criminal sanction upon any American citizen-scientist, not an employee of a public telephone and telegraph utility, who would dare do research in the proscribed telecommunications area. The statute restrains competition, research, free enterprise and trade – perhaps because Petitioner and others may well be more advanced than the monopolistic utilities' scientist-employees.

And under the conviction in Indictment Numbers 7952 and 7956, the two patented inventions are designated by Court order as illegal devices subject to suppression and destruction, which action, Petitioner contends, violates the Fourth and Fourteenth Amendment due process clause by depriving him of vested property; and, his imprisonment deprives him of liberty without due process of law.

Petitioner contends *certiorari* should be granted to review these constitutional violations.

2. *Certiorari* should be granted to determine if a criminal accused be denied constitutional rights to confront witnesses and challenge evidence at a preliminary hearing authorized by State statute when a *nisi prius* Court refuses to permit the preliminary hearing to be conducted.

Article 26, Section 115, Annotated Code of Maryland (Appendix B, *infra*) is specific in its terms and adopts the Federal *Mallory-McNabb* rule, by State statute, for the City of Baltimore alone in Maryland. A Montgomery County, Maryland, ordinance orders the same *McNabb* immediacy and preliminary hearing. At bar, the Petitioner was arrested, taken to a hospital for emergency treatment and then was taken to a police station where he, as is custom, posted a set amount of cash as collateral in lieu of bond, to guarantee the appearance at a preliminary hearing at the Municipal Court. Petitioner was not called to preliminary hearing. The State's attorney, instead, ordered the arresting officers to testify before the Grand Jury which, on the uncontested testimony given, presented a true bill and indictment followed.

Under Maryland Law (Article 27, Section 39, explicated in *State v. Panagoulis*, 253 Md. 699, 253 A2d 877 (1969)) an

accused may not appear before Grand Jurors and his request to appear in his defense may be deemed contempt of Court. The right to challenge the evidence or confront witnesses is thereby abrogated by statute and case ruling. The prosecutor's election to ignore the statute (Article 26, Section 115) deprived Petitioner of a statutory right which trial defense counsel moved to reclaim with a motion to stay to permit the State authorized privilege. The *nisi prius* trial court, with indictment before it, overruled the motion relying on the Maryland Court of Special Appeals holdings that an accused has no constitutional right to a preliminary hearing. (*Clemons v. State*, 9 Md. App. 127, *Graham v. State* 6 Md. App. 458). This intermediate appellate court, on appeal, was quick to give *imprimatur* to its earlier decisions and found *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, filed June 22, 1970, as non-applicable to Maryland in a constitutional sense.

The Opinion (Appendix E, p. 14, *infra*) under, "Lack of a Preliminary Hearing" went through circumgyrations to endorse the Lower Court's adherence to its pre-*Coleman* holdings. The Court of Special Appeals has rules that a preliminary hearing, without counsel, is not essential, in a constitutional sense, to a valid indictment or a valid conviction; but, has as yet to rule on the third leg of the tripod upon which preliminary hearings rest – the statutory – constitutional right to have a preliminary hearing, with counsel, at which to confront witnesses and challenge evidence without presenting an affirmative defense. Under such situation, an accused or his counsel may well defeat evidence and reduce the charge below the probable cause necessary for a committing magistrate to bind over for Grand Jury action in cases beyond his jurisdiction.

(The Gerstein Diverter, at such hearing, may well have been excluded with presentation of Public Service Commission transcript in which the chairman (Liss, J.) and the Maryland Attorney General agreed that possession of the device by Petitioner, its inventor, was not violative of the statute (Article 27, Section 557A). The invention would have been exempted and the State could not have brought its conviction under Indictment Number 7952 and 7956.)

The Opinion, *supra*, holds that the mandatory preliminary hearing statute (Article 26, Section 115) must be interpreted (not strictly construed) in light of Article 26, Section 109 (c) (3) (Appendix D, *infra*) and concludes that any and all indictments issued by a Grand Jury, in keeping with Section 109 (c) (3), are conclusively presumed to be issued by the Grand Jury as a result of an investigation initiated on its own motion. In explanation of this astounding conclusion, the Court says the Grand Jury is a superior body to that of the Municipal Court.

Petitioner can only ask how far can an appellate court reach to find an affirmation it deemed to be necessary according to its own philosophy or view of criminal justice?

The Opinion, erudite on its surface, neglects to bring forth the dual personality of a palatinate Grand Jury in a remaining, common law state which roots are still vibrant and unchanged by State statute. The Maryland Grand Jurors, by their oath and installation, are the Grand Inquisitors of Maryland and also the "hundreds" of the common law assizes. The Grand Jury, in fact, wears two hats simultaneously. Under the one, it can investigate any and all crime on its own initiative, or on its own motion, (as would a Congressional investigation committee); and, under the other hat, hear complaint of law enforcement

officials or citizenry and decide on these complaints brought it by others, and not on its own motion, whether to hold one accused by others to answer to society for his misdeeds.

These dual functions are separate and distinct and not subject to circumincession by any application of illogical or logical twisting to achieve a desired result. Evidence brought to a Grand Jury from sources outside its initiative as Inquisitors cannot, by any stretch of the imagination, be conclusively presumed to be evidence initiated upon its own motion as Inquisitors.

Petitioner was denied his statutory right to a preliminary hearing at which, under *Coleman*, he has a right to be represented by counsel to protect his interests and to his constitutional right to challenge the witnesses against him and the evidence brought forth by the State in its attempt to show sufficient probable cause for remand to a Grand Jury, which then acts on evidence from outside its own initiative.

The Maryland appellate courts deign not to answer the question of violation of constitutional rights inherent in the deprivation of a preliminary hearing. Petitioner, therefore, must ask this Court to address itself to the issue, under the Sixth Amendment, in expansion or contraction of *Coleman* and grant the requested writ of *certiorari*.

3. *Certiorari* should be granted to determine if a criminal accused is denied the right to competent and effective counsel when immediate trial is ordered despite arguments that counsel is not prepared to provide effective representation.

An impatient trial judge castigated new defense counsel who announced that he was not prepared to offer effective representation in a complex case twenty (20) days after he entered the cause (*supra*). The trial judge also refused new counsel overnight or even a few hours to present exculpatory witnesses on the admissibility of the subterfuge warrant (G:T. 106-109). The trial judge also refused to consider antecedent counsel motions *de novo* and ordered immediate trial. Counsel, thereby, was forced forward – and the transcript reflects a lack of preparation in the highly technical area of telecommunications.

Petitioner contends these rulings of the Court were arbitrary, unreasonable under the circumstances and prejudicial to his right to procedural due process in violation of his Sixth and Fourteenth Amendment guarantees.

Avery v. Alabama,. 308 U.S. 444, *Martin v. Virginia*, 365 Fed. 2d 549, *Twiford v. Peyton*, 372 Fed. 2d 670 (CCA 4) and *U. S. v. Rundle*, 394 Fed. 2d 748 permit counsel to prepare a defense. *Gideon v. Wainwright*, 372 U.S. 335, *Miranda v. Arizona*, 384 U.S. 436. *Johnson v. Zerbst*, 304 U.S. 358, *Coleman, supra*, and *Wayne v. State*, 4 Md. App. 424, guarantee an accused the right to counsel. This right to counsel presumes adequate counsel and not just the corporal presence of an admitted member of the bar (*Fowler v. State*, 7 Md. App. 651). Adequate counsel presupposes prepared counsel familiar with the facts, evidence, research law and knowledge of the expected testimony of prosecution witnesses gleaned through discovery procedures.

The Sixth Amendment, imposed on the States through the Fourteenth Amendment, guarantees also the confrontation of these witnesses (*Pointer v. Texas*, 380 U.S. 400, *Douglas v.*

Alabama, 380 U.S. 415, *Brookhart v. Janis*, 384 U.S. 1, *Barber v. Page*, 390 U.S. 719, *Bruton v. U.S.*, 391 U.S. 123 and others). Confrontation includes cross-examination and cross-examination falls to counsel. Proper cross-examination presupposes adequate preparation which cannot be done in twenty (20) days by discovery, mandamus or other avenues available in pre-trial preparation. Sixth Amendment cases now hold that cross-examination, to be effective, must have wide latitude in the testing of witness fidelity and recollection. (*New Jersey v. Hunt*, 25 NJL 138, 138 A.2d 1, *New York v. Rosario*, 9 NY.2d 286, 173 NE.2d 87, *New Mexico v. Morgan*, 67 NM 287, 354 P.2d 1006).

Without proper preparation, defense counsel is liable to valid complaint of incompetency, and, without preparation and adequate information, the accused is wronged and must resign himself to picking at his accusor's testimony on bare speculation or to sitting by helplessly and doing nothing (1 Lord Stephen, *History of Criminal Law*, 382 (1883)).

The trial imposed a stricture, a foreclosure, upon Petitioner and his counsel. The rulings are made in a vacuum and the denial of adequate time for trial preparation was an action not within the sound discretion of the Trial Court (which the Court of Special Appeals of Maryland has expanded to "within the widest discretion" of the Trial Court in this case). The rulings run counter to the constitutional concepts of fundamental fairness, procedural due process, capacity to defend and fair trial, which concepts should not be subserviant to the personal wishes of a judge or prosecutor, the moving of a court docket or administrative inconvenience.

Petitioner contends the issue of foreclosure of the right to genuine and effective representation by counsel is subject to *certiorari* review.

4. *Certiorari* should be granted to ascertain, from the voluminous record below, if the rights of the accused have been derogated by the Trial Court's impatience, coaching of the prosecution and personality conflict with trial counsel; and, by the impatient and Cavalier attitude of the lower appellate judge who failed to answer the issues presented.

Only a reading of the record transcript and briefs below can bring to light the "totality of the trial atmosphere." The Opinion (Appendix E, *infra*) speaks for itself to reflect the personal feelings of the jurist who directed the opinion to Appellant counsel and the method of presentation.

Under "Other Defects", (Appellant Brief, pp. 31-32), which the lower appellate court characterized as a "gaggle" of miscellaneous claims more or less indicated under the question, "Did the Trial Court Commit Reversible Error?" (Opinion) is found:

> "Considering the totality of the trial atmosphere and the cumulative effect on the jurors, one must look also to other actions of the prosecutor and the trial court.
>
> "The prosecutor (T. 287) requested and was granted permission and argued the law of chain of custody before the jury and made proffer of proof of the manucaption of the evidence under defense objection. The Trial Court after the defense requested a bench conference (T. 119), which did not occur,

discussed the law of jury exclusion on the validity of the warrant, before the jury (T. 121-122).

"Wigmore on Evidence, Section 1808 (1) says legal argument or a proffer of evidence which counsel believes will be disputed or call for a judicial ruling is to be controlled by a sense of professional honor which tells the attorney that such should not be stated in the jury's hearing – because it may be taken as true by jurors despite the judge's exclusion and that if attempted the judge should intervene *ex mero motu.* Wigmore cites the Uniform Act, Canons of Professional Ethics of the American Bar Association as, 'the lawyer should not offer evidence which he knows the Court will reject to get the same before the jury.'

"The transcript is replete with comments by State and Trial Court, which taken collectively, redound to the Appellant's prejudice: (T. 19 (11/20), T. 8, 10, 20, 23, 32, 42, 65, 68, 75, 84, 94, 98, 108, 113, 132, 146, 155, 159, 216, 221, 224, 225, 240, 239, 246, 251, 260, 277, 284, 279, 299, 300, 322, 334, 408, 409, 413, 433, 448, 450, 474, 515, 587).

"When errors are of such character and so interwoven with the case to lead a fair and impartial mind, trained in judicial investigation, upon examination of the whole case and all the rulings involved therein, to the conclusion that there is a *reasonable probability that such errors may have affected the determination of the case,* they are prejudicial and reversible (*Dobbs v. State,* 148 Md. 34). (Emphasis supplied)

"Appellant contends that the cumulative effect of errors in this case meets the *Dobbs* rule and calls for reversal."

Petitioner contends his legitimate complaints on appeal were ignored and should receive answer because his Fourth, Fifth and Fourteenth guarantees were violated as a result of personality conflicts between counsel and the bench at both court levels. To this end, he prays a grant of his petition of review.

5. *Certiorari* should be granted to determine if Petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights were violated by summary and pedantic interpretation of rules of procedure which prohibited him from presenting an adequate defense.

The Opinion (Appendix E, p. 21-23) under "Pre-Trial Motions" attempts precis of the motions presented to the lower trial courts (Appendix A, Docket Entries, *infra*) and the Trial Court at (G:T. 565-567) and concludes that the Lower Court, in refusing to consider the resubmitted motions *de novo*, committed no "error" in the circumstances.

Ignored is the fact that the trial judge, who pointed out that veniremen were entering the courtroom which action made motions late, was the person, who, in earlier impatience, ordered the jury to be brought down.

The Opinion states new defense counsel had been aware for weeks of the prior motions and answers and had in fact received copies of the answers previously filed. It presumes being aware of existing motions equates to having studied them and prepared defense from them. Truly, a rebuttable presumption. Then the pedantic statement, "and we note, that it does not appear that Appellant affirmatively requested a postponement of the trial on 9 December." Is not a motion to stay proceedings synonymous with a request for postponement?

Under *Nardone v. U.S.*, 308 U.S. 338, a pre-trial motion to suppress evidence taken in intercepted/eavesdrop activities is required before trial. New defense counsel was prohibited from filing even such a motion.

Both courts would have trial counsel, in the "heat of battle" – and battle there was here certainly – held to as strict adherence to the rules of procedure as one would hold the draftsman to a deed, will or statute wherein pressure and time is not of the essence. Had the Trial Court permitted time for preparation, such strict interpretation of rules might have some validity; but, under these circumstances, the imposition of procedural and legalistic perfection is unwarranted.

Such rulings, opinions, and orders redounded to Petitioner's prejudice under the totality of the circumstances and beg review by a disinterested and non-emotional tribunal. Petitioner prays his writ be granted.

6. *Certiorari* should be granted to determine if Maryland's holdings on adequacy of search warrant affidavits violate the constitutional fundamental fairness doctrine.

Maryland's new Court of Special Appeals has adopted the "four corners rule" for search warrant affidavit (*Sessoms, Smith, Scarborough, supra*) and prohibits defense counsel the right to "go behind the warrant" to point out inadequacy of information, misrepresentation, chicane or even down right perjury by the affiant. This strict ruling runs counter to fundamental fairness in that the accused may never challenge the veracity of an application-affidavit which portends probable cause. The only recourse for the accused is to bring and prove perjury charges against the affiant (*Tischler, supra*) after the accused has been convicted and imprisoned.

The affidavit (Appendix B) on its face presents a minimum of probable cause to inveighle as unsuspecting judge to issue a warrant. This was admitted by appellate counsel on direct question from the pedantic opinion writer. Amen, the door is slammed shut (Appendix E, Opinion, The Warrant Claim, p. 19-20).

The Lower Court, attempting to be fair, waived the *Sessoms* holding but later refused to permit Mrs. Whittaker or others to repudiate the affiant's sworn testimony. The Court of Special Appeals, outraged that a Lower Court might seek fairness for the accused, wrote:

> "The Trial Court had no discretion to look outside the affidavit on the issue or probable cause and could not waive the rule (*Sessoms*). We are not bound on appellate review by its actions in this respect. We look only to the affidavit, and as it shows probable cause, it supported the issuance of the warrant . . . " (Opinion, *supra*).

Did Sir Thomas More have a more flexible court in the Star Chamber?

Adherence to this strict State ruling encourages falsification or unwarranted expansion or deletion of facts unknown or known to affiants, primarily the police, and encourages an overzealousness which, if unbridled, can trample the fundamental rights of the citizen, be he criminal or not.

In this case, the inferences and deductions drawn from the testimony show police had more evidence as to probable cause for the warrant. Should not all available information and evidence be presented to the issuing judge when warrant is sought? Fundamental fairness indicates that this should be so. Or, is it permissible to present only the minimum of probable cause and leave the interposed judiciary cuckold?

In *Sgro v. U.S.*, 287 U.S. 206, 53 S. Ct. 138,Chief Justice Hughes said:

> "The proceeding by search warrant is a drastic one. Its abuse lead to the adoption of the Fourth Amendment and this, together with legislation regulating such process, should be liberally construed in favor of the individual." (Citing *Boyd v. U.S.* 116 U.S. 616, 6 S. Ct. 524, accord: *Adams v. U.S.*, 192 U.S. 858; *Byars v. U.S.*, 273 U.S. 28; *Marron v. U.S.*, 275 U.S. 191.

Petitioner contends the Maryland Ruling in *Sessoms* is antithetical to the fundamental concepts of our constitutional rule of law and is a proper issue for review.

CONCLUSION

For the reasons stated herein, *certiorari* should be granted.

Respectfully submitted,

A. DAVID GOMBOROV,
DAVID S. HARRIS,
JOHN D. HACKETT,
Attorneys for Petitioner.

APPENDIX A

Docket Entries

(Criminal Court of Baltimore, Indictment Number 7951-7955 (defrauding telephone company of $2.91 in U.S. currency); Indictment Number 7952-7956 (defrauding telephone company); Indictment Number 7954 (conspiracy), September Term, Docket of 1968; Indictment Number 3209 (lottery and addendum), January Term, Docket of 1969; State of Maryland v. Sidney Gerstein, Defendant).

January 9, 1969 – Indictments Numbers 7951, 7952 and 7954, filed

May 8, 1969 – Indictment Number 3209, filed.

March 31, 1969 – Motion for bill of particulars, discovery and inspection, supression of evidence, discovery of electronic interception/eavesdropping, and disclosure of witnesses, filed (Francis S. Brocato, Esquire).

April 11, 1969 – State answers to motions, filed.

April 21, 1969 – Defendant's exceptions to state answers, filed.

May 14, 1969 – Arraigned and pleads not guilty as to all indictments. Hearing on motions (Harris, J.). Defendant motions of eavesdropping and exceptions to answer on particulars overruled; motions for postponement discovery and particulars withdrawn.

May 15, 1969 – Defendant motion to suppress evidence heard and denied. Pleas of *Nolo Contendere* held *sub-curia* (Harris, J.). *Stet* entered as to co-defendant.

November 13, 1969 – Plea of May 15, 1969, withdrawn. Motion of defense counsel to withdraw appearance granted (Harris, J.).

November 20, 1969 – Appearance of David S. Harris, Esquire, entered. Plea of not guilty to all changes entered.

Motions to stay proceedings to permit preliminary hearing and to dismiss indictments heard and denied. (Prendergast, J.).

December 2, 1969 – Appeal to the Court of Special Appeals of Maryland on denial of stay of proceedings to permit preliminary hearing, filed.

December 9, 1969 – Appearance of A. David Gomborov, Esquire, as co-counsel entered. Motion to stay proceedings to permit preliminary hearing filed and overruled as moot. Affidavit for removal denied. Motion to dismiss heard and held *sub-curia*. Motions for particulars, discovery, general and as to electronic interception, suppression of evidence, disclosure of witnesses, refiled and denied. (Prendergast, J.)

December 12, 1969 – Verdict: Guilty, first and second counts of combined Indictment 7951-7955; Guilty, first and second counts of combined Indictment 7952-7956; Guilty, Indictment 7954; Guilty, first, second and fourth counts and *addendum*, Indictment 3209. Bail set at $10,000.00.

December 16, 1969 – Motion for new trial, filed.

January 15, 1970 – Motion for new trial heard and denied (Oral Opinion).

January 15, 1970 – Judgment: Indictment 7951, first count, sixth months and $500.00 fine; second count, six months and $500.00 fine, concurrent with each other but consecutive with Indictment 3209. Indictment 7952, six months and $500.00 fine, consecutive to each other and consecutive with Indictment 3902. Indictment 7954, one year and $1,000.00 fine, concurrent with Indictment 3209. Indictment 3209, three years and $1,000.00 fine in each count concurrent with each other; *addendum*, three years and $1,000.00 fine, concurrent with Indictment 3209 and Court costs. (A total punishment of 4 years in prison and $2,000.00 fine with Court costs of $3,363.50).

January 15, 1970 – Appeal filed to the Court of Special Appeals of the State of Maryland. Bail set at $20,000.00.

October 29, 1970 – Appeal: Conviction affirmed (Orth, J.), Number 41, September Term, 1970.

December 8, 1970 – Petition for intrastate writ of *certiorari* to be filed. Bail increased to $30,000.00 on condition that fine and Court costs be paid (Prendergast, J.).

January 13, 1971 – *Certiorari* petition denied by Court of Appeals of Maryland (Miscellaneous Number 271, September Term, 1970).

January 29, 1971 – Petition for continuance on bail pending Petition for Writ of *Certiorari* to the Supreme Court of the United States heard and denied (Prendergast, J.). Petitioner incarcerated.

APPENDIX B

**(Police Department, City of Baltimore,
Operations Bureau,
Affidavit, Form 67/189)**

Application and Affidavit

To the Honorable Judge (a) Joseph L. Carter of the (b) Supreme Bench of Baltimore City, the undersigned being duly sworn deposes and says that he has reason to believe a c/m/5'8", 40 years, 160 lbs, medium brown complexion, known as first man; c/m/5'10", 45 years, 180 lbs, medium brown complexion, known as second man; a c/m/40 years, 5'10", 175 lbs, dark brown complexion, known as third man; a w/m/45-50 years, almost bald-headed, glasses, 5'10" 215 lbs, herein known as the fourth man; c/m/5'10", 170 lbs, 30 years, medium brown complexion, known as fifth man, and entire premises 2300 Barclay Street in the City of Baltimore, there is now being concealed certain property, namely; (d) lottery slips and related gambling paraphernalia which is in violation of the laws of Maryland pertaining to (e) Annotated Code of Maryland, Article 27, Sections 356-358 and 360-361 (lotteries).

AND that the facts tending to establish grounds for issuance of search warrant are set forth in the affidavit attached thereto and made a part thereof.

WHEREFORE, your affiant prays that a search and seizure warrant be issued for said (f) first, second, third, fourth and fifth men and entire premises 2300 Barclay Street.

/s/ THOMAS J. ALSTON
Patrolman

SWORN to before me and subscribed in my presence this 13th day of December, 1968.

/s/ JOSEPH L. CARTER
Judge

On December 5, 1968 I went to the vicinity of Barclay and 23rd Streets at 9:30 a.m. paying particular attention to 2300 Barclay Street for evidence of violations of our lottery laws. 2300 Barclay Street is a two-story brick building painted red on front, gray faded on the south side of this corner building. The wood is painted red and green. The first floor formerly housed a grocery store, as is told by the sign over the first floor level, which reads Gerstein's Groceries. The front/side doors are also painted green, wood panels cover part of the front door and windows, apparently as a result of our civil disturbance, as this business is not now operating.

I arrived on my detail at 9:30 a.m. and remained until 2:20 p.m. where, during same, I observed five unidentified colored females and seven unidentified colored males enter after knocking on the front or side doors of 2300 Barclay Street, staying only a few minutes and leaving in various directions and out of my view.

At 12:20 p.m. I had the occasion to be passing 2300 Barclay Street where I observed two males who are described as being colored male 5'8", 40 years, 160 lbs, medium brown complexion, herein known as the First man, state to the other male, colored male 5'10", 45 years, 180 lbs, medium brown complexion and herein known as the Second man "Man I know Sid will take these numbers." The Second man replied "O.K.! Let's see" and both men went to the side door of 2300 Barclay Street where they knocked and were admitted by someone I could not see. Both stayed a few minutes and left walking together and out of my view.

At 9:20 a.m. December 8, 1968 I again returned to the vicinity of Barclay and 23rd Streets, paying particular attention to 2300 Barclay Street for further evidence of violations of our lottery laws. I arrived at 9:20 a.m. and selected a point of observation where I remained until 2:00 p.m.

During my detail I witnessed six colored females and nine colored males enter either the front or side door of 2300 Barclay Street where they stayed only a few minutes and left, walking in various directions and out of my view.

On December 11, 1968 at 9:00 a.m. I again returned to the vicinity of the 2300 block of Barclay Street, paying particular attention to 2300 Barclay Street for further evidence of violations of our lottery laws. I observed a male, colored, 40 years old, 5'10", weighing 175 lbs and having a dark brown complexion and herein known as the Third man, and a white male about 45-50 years, almost bald-headed, glasses, 5'10", 215 lbs, and herein known as the Fourth man. The Third man had been standing near the side entrance to 2300 Barclay Street for about 10 minutes before the Fourth man came from somewhere in the 2200 block of Barclay Street to the side entrance, carrying a small bag and a hot cup used for hot beverages in his right hand. The Third man stated "Damn Sid, I thought you were never coming, you know I don't like to have these numbers on me." The Fourth man replied "alright, alright, let's get inside" and used a key which he held in his left hand to open the door of 2300 Barclay Street and both males went inside, where they stayed until 3:00 p.m. when both came out of the side door accompanied by another male who was seen to go into 2300 Barclay Street at 1:25 p.m. using the side door to enter and carrying a small brown bag in his right hand, who is described as a colored male, 5'10", 170 lbs, 30 years, medium brown complexion, short chopped haircut, who is herein known as the Fifth man.

During my detail, which lasted until 3:20 p.m. I witnessed eight unidentified colored males and six unidentified colored females enter 2300 Barclay Street either through the front or side entrances, staying only a few minutes and leaving out of my view in various directions.

It is to be noted that I, the Affiant can positively identified the men referred to herein as the First, Second, Third, Fourth and Fifth men.

The lottery carried on and known as numbers requires that the play or slips be collected by certain people designated as runners or writers and then returned to persons or corporations conducting the game, and it is the belief of the affiants, founded upon his experience with such violations, that the persons referred to herein are runners or writers and are actively engaged in the business of conducting a lottery.

/s/ THOMAS J. ALSTON
SIGNATURE

/s/ JOSEPH L. CARTER
JUDGE

APPENDIX C

(Supreme Bench or Municipal Court of Baltimore City, Operations Bureau, Search and Seizure Warrant, Police Department, Form 67/187)

TO: Any Police Officer of Baltimore City;

Affidavit having been made before me by Officer Thomas J. Alston, that he has reason to believe a c/m/5'8", 40 years 160 lbs, medium brown complexion, known as first man; c/m/5'10", 45 years, 180 lbs, medium brown complexion, known as second man; c/m/40 years, 5'10", 175 lbs, dark brown complexion known as third man; a w/m/45-50 years, almost bald-headed, glasses, 5'10", 215 lbs, herein known as the fourth man; c/m/5'10", 170 lbs., 30 years, medium brown complexion, known as fifth man and entire premises of 2300 Barclay Street in the City of Baltimore there is now being concealed certain property namely lottery slips and related gambling paraphernalia which is in violation of the laws of Maryland pertaining to Annotated Code of Maryland, Article 27, Section 356-358 and 360-361 (lotteries) and I am satisfied that there is probable cause to believe that the property so described is being concealed on the person/premises above described and that the foregoing grounds for application for issuance of a search warrant exists.

You are therefore commanded, with the necessary and proper assistance, to search forthwith the person/premises/vehicle hereinabove described for the property specified, executing this warrant and making the search; and if the property be found there, to seize it; and if upon execution of this warrant, there are found persons then and there engaged in the commission of a crime, arrest those so participating; leaving a copy of this warrant with an

inventory of the property seized and returning copy said warrant and inventory, if any, to me within five days after execution of this warrant; or, if not served, to return this warrant to me within five days after its expiration as required by law.

Dated this 13th day of December, 1968.

/s/ JOSEPH L. CARTER
JUDGE

APPENDIX D

(Relevant State Statutes)

(Annotated Code of Maryland, 1957, as amended 1970 Supplement)

Article 27, Section 557A: (Acts of 1965, Chapter 199, Section 1)

It is unlawful for any person knowingly to make, sell, offer or advertise for sale, possess, or give or otherwise transfer to another any instrument, apparatus, equipment or device or plans or instructions for making or assembling any instrument, apparatus, equipment or device which has been designed, adapted, used or employed with the intent or for the purpose of (1) obtaining telephone or telegraph service or transmission of a message, signal, or other communication by telephone or telegraph, or over telephone or telegraph facilities, without the payment of charges therefore; or (2) concealing or assisting another to conceal from any supplier of telephone or telegraph service or from any person charged with the responsibility of enforcing this section, the existence or place of origin or of destination of any message, signal, or other communication by telephone or telegraph, or over telephone or telegraph facilities.

Any person who violates any provision of this section is guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment not exceeding twelve months, or by a fine not exceeding $500.00, or by both such fine and imprisonment in the discretion of the Court. And, any such instrument, apparatus, equipment, or device, or plans or instructions therefore may be seized by Court order or under a warrant; and upon a conviction, which has become final, or any person owning the seized materials, or having any ownership interest therein, for a violation of any provision of this section, the instrument, apparatus, equipment, device, or plans or instructions shall be destroyed as contraband by the

Court in which the person is convicted. (1965, Ch. 199, Section 1)

Editor's note – Section 2 of Ch. 199, Acts 1965 provides that "nothing in this act applies to or affects any case pending on June 1, 1965, and nothing in this Act applies to or affects any happening or circumstance occurring prior to June 1, 1965.)

Article 26, Section 115:

"Whenever any person shall be arrested in the City of Baltimore upon any criminal charge, or for the violation of any law of this State, or of any ordinance of the Mayor or City Council of Baltimore (other than motor vehicle charges) it shall be the duty of the police officer or constable making such arrest, or in whose custody the person arrested may be, to take such person before a judge of the Criminal Division of the Municipal Court of Baltimore City, and if any offense charged against the person arrested is beyond the jurisdiction of the Court, the judge of the Criminal Division shall sit as a committing magistrate with the same powers and duties as were invested in and imposed upon the justices of the peace assigned to the station houses of Baltimore City on the date preceeding the effective date of this subtitle, provided that any person charged with murder, manslaughter, or manslaughter by automobile shall be taken by the police officer making the arrest, or in whose custody the person arrested may be, before a judge at the Criminal Division of the Municipal Court sitting at that location of the Criminal Division (except the housing part) which is closest to the office of the State's Attorney of Baltimore."

Article 26, Section 109 (c) (3):

"The powers of the Grand Jury of Baltimore City as the same as existed on the day immediately preceeding the first Monday in May 1961, to present any person for trial in the

Criminal Court of Baltimore City as a result of any investigation initiated on its own motion, or that of any of its predecessors, shall not in any way be limited, abridged, or circumscribed by this section (prescribing the jurisdiction of the Municipal Court). Any such presentment by the Grand Jury of Baltimore City shall be conclusively presumed to have been made in accordance with the provisions of this subsection."

APPENDIX E

(In the Court of Special Appeals of Maryland, Number 41, September Term, 1970, Sidney Gerstein v. State of Maryland, Opinion by Orth, J., filed October 29, 1970.)

The threnody of Sideny Gerstein makes clear his dissatisfaction with the judgments rendered against him at his jury trial in the Criminal Court of Baltimore[1] but for the most part leaves clouded the reasons why he feels they should be reversed. When his prolix belief is alembicated there remain three contentions presented by specific questions and a gaggle of miscellaneous claims more or less indicated under the general

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[1]The jury found Appellant guilty of offenses as follows:

Indictment 7951/7955 – two counts of obtaining telephone service with intent to cheat and defraud;

Indictment 7952/7956 – knowingly possessing an instrument designed with the intent and for the purpose of concealing from the telephone company and law enforcement agencies charged with enforcing Art. 27, § 557A the existence or place of origin of communications by telephone;

Indictment 7954/7958 – conspiring with persons unknown to violate the lottery laws;

Indictment 3209 – selling a lottery ticket, 1st count; keeping a room located at 2300 Barclay Street for the purpose of selling lottery tickets, 2nd count; possession of lottery paraphernalia.

Warned by an addendum to indictment 3209 that the State intended to prosecute him for that current offense as a subsequent offender, he elected to be tried separately by the court on that issue and after his conviction under indictment 3209 he was found to be a subsequent offender.

question, "Did the trial court commit reversible error?" We consider the three contentions under the specific questions and such of the claims under the general question as are set out with sufficient specificity as to warrant attention.

We first observe that we have been mindful, as appellant implores us of "the totality of the trial atmosphere" in our "review of assigned error." We have reviewed the record and find that the trial was conducted under the "constraints of the rules of procedure and evidence" by an impartial judge with due regard for the protection of appellant's "rights, dignity and personal integrity." We find no substance in appellant's general indictment of the proceedings against him.

The Lack of a Preliminary Hearing

Appellant moved prior to trial to dismiss the indictments against him on the ground that he had not received a preliminary hearing to which he was entitled as a matter of right under Code, Art. 26, § § 107-129. He also moved to stay the proceedings until a preliminary hearing had been held. He was arrested on 13 December 1968, and according to his brief, taken in an ambulance to the hospital, treated for a head injury and then went home having been released on bail. On 23 December he was presented. Capias was issued and returned cepi bail. Indictments were returned on 9 January 1969.

Maryland has no general law requiring a preliminary hearing and we have held that an accused does not have a constitutional right to one. *Clemons v. State,* 9 Md. App. 127; *Graham v. State,* 6 Md. App. 458. We find nothing in *Coleman v. State of Alabama,* 90 S. Ct. 1999 to indicate that a preliminary hearing is constitutionally mandated. At the common law when an accused was brought before the magistrate, it became the magistrate's duty to conduct a hearing and, after due investigation, to discharge, bail or commit him. If the magistrate determined that there was probable cause to suppose the accused guilty, he was held for action of the grand jury,

commitments for trial being certified to the court having jurisdiction to try the offense charged. See Hochheimer's *Criminal Law*, 1st Ed., §§ 105-108, pp. 75-76. Code, Art. 26, §§ 107-129 concern the Municipal Court of Baltimore. It is the duty of every judge sitting in the criminal division thereof before proceeding to hear, try and determine any charges within the jurisdiction of the court, to inform the accused of his right to a jury trial. If he prays a jury trial "the judge shall thereupon determine whether probable cause exists for believing that said person is guilty" and if it be so determined, the judge shall forthwith commit him or hold him for bail for trial in the Criminal Court of Baltimore. If the judge determines that probable cause does not exist, the charges shall be dismissed. The same procedure is followed when in such cases the State may and does pray a jury trial. § 111 (a) and (b). When the accused is charged with an offense beyond the jurisdiction of the Municipal Court of Baltimore City the procedure to be followed is prescribed by § 115:

> "Whenever any person shall be arrested in the City of Baltimore upon any criminal charge, or for the violation of any law of this State, or of any ordinance of the mayor or city council of Baltimore [other than motor vehicle charges] it shall be the duty of the police officer or constable making such arrest, or in whose custody the person arrested may be, to take such person before a judge of the criminal division of the Municipal Court of Baltimore City, and if any offense charged against the person arrested is beyond the jurisdiction of the court, the judge of the criminal division shall sit as a committing magistrate with the same powers and duties as were invested in and imposed upon the justices of the peace assigned to the station houses of Baltimore City on the day preceding the effective date of this subtitle, provided that all persons charged with murder, manslaughter, or manslaughter by automobile shall be taken by the police officer making the arrest, or in whose custody the person arrested may be, before a judge of the criminal division of the Municipal Court sitting at that

> location of the criminal division [except the housing part] which is closest to the office of the State's Attorney of Baltimore."

Chapter 616 Acts 1961, which enacted the law codified as Art. 26, § 115, at the same time repealed § 428 of the Charter and Public Local Laws of Baltimore City (1949 Ed.) as amended by Ch. 458 Acts 1951. Section 115 in its provision that the Municipal Court Judge would sit as a committing magistrate "with the same powers and duties as were vested in and imposed upon the justices of the peace assigned to the station houses of Baltimore City on the day preceding the effective date of this subtitle", was referring to § 428 of the Local Laws of Baltimore City. As amended it was in substance the same as § 115 except that the arrestee was to be taken before a justice of the peace. The justice of the peace was directed "to take jurisdiction of the case and dispose of such case promptly." The justice of the peace disposed of such cases by trying those in which he had jurisdiction, except when a jury trial was prayed, in which event he conducted a preliminary hearing, and as to those cases in which he did not have jurisdiction he conducted a preliminary hearing under the common law authority.[2] The dictates of § 115 however must be considered in the light off § 109 (c) (3). It reads:

> "The powers of the grand jury of Baltimore City as the same existed on the day immediately preceding the first Monday in May 1961, to present any person for trial in the Criminal Court of Baltimore City as the result of any investigation initiated on its own motion or that of any of its predecessors, shall not in any way be limited, abridged, or circumscribed by this section [prescribing the jurisdiction of the Municipal Court].

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[2]Rule XVIII of Rules of the Municipal Court of Baltimore City prescribes how all preliminary hearings are to be conducted. See *Code of Public Local Laws of Baltimore City*, Everstine (1969), pp. 295-296.

> Any such presentment by the grand jury of Baltimore City shall be conclusively presumed to have been made in accordance with the provisions of this subsection."

It is clear that if the grand jury of Baltimore City presents an accused who has not been taken before a judge of the Municipal Court and either tried on a charge under the jurisdiction of that Court or, when that court does not have jurisdiction of the offense, held or discharged after a preliminary hearing, it is conclusively presumed that the presentment was made by the grand jury as the result of an investigation initiated on its own motion. As the right to do so may not be "limited, abridged, or circumscribed" by the Municipal Court Act, the action of the grand jury is superior to any statutory right to a preliminary hearing provided by § 115.

Here appellant lost any right he may have had under § 115 to a preliminary hearing on the charges against him when the grand jury of Baltimore City presented him on the charges. Therefore the lower court did not err in denying the motion to dismiss the indictments on the ground he had not had a preliminary hearing, nor did it err in denying the motion to stay the proceedings until a preliminary hearing was held.

The Motion for a Mistrial

During the trial there was a question whether a police officer would have been able to recognize appellant's voice. Laying a foundation that the officer in the past had an opportunity to talk with appellant and to hear his voice the officer was asked by the State the total times he had conversed with appellant and the length of the conversations. The officer, answering, said, "Well in 1962 I made a raid there." Defense counsel objected and moved that it be stricken. The court said: "Yes, strike that, the jury will disregard reference." Appellant moved for a mistrial. The court denied the motion saying: "The jury will disregard the reference the Lieutenant just made to how he happened to be talking to the defendant but the

question is how long did you talk to him on that occasion and don't repeat the occasion Lieutenant." We do not think it unreasonable to conclude that the jury could and did follow the judge's instructions to disregard the information. See *Bruton v. United States*, 391 U.S. 123, 135. The determination whether or not to grant a mistrial is within the sound discretion of the trial court. *Parker v. State*, 7 Md. App. 167; *Carroll v. State*, 3 Md. App. 50. We see no abuse of discretion here, particularly in view of the judge's prompt admonition to the jury. *Shotkosky v. State*, 8 Md. App. 492; *Baldwin v. State*, 5 Md. App. 22.

The Alleged Assistance of the Prosecution by the Trial Court

Appellant recognizes that the trial court may properly intervene to see that full facts on an issue are brought out in an attempt to assure a correct decision. *Jeffries v. State*, 5 Md. App. 630. We find the actions of which Appellant complains to have been no more than that. We do not believe that Appellant's charges that the court instructed the prosecutor on trial procedures, on presentation of evidence, and on rights concerning witnesses and that it interposed *sua sponte* cautions and called recesses have real substance, assuming them to be factually correct, when viewed in the frame of reference in which the particular action was taken. We do not find that they represent an abuse in the wide discretion the judge has in the conduct of a trial at which he presides. See *Plank v. Summers*, 203 Md. 552; *Stewart v. State*, 4 Md. App. 565. Rather the transcript of the proceedings reveals only the patient efforts of the trial court in the face of an aggressive defense to protect Appellant's rights, to insure that only such evidence as was properly admissible would be received and to see that the full facts supporting both the position of the State and of Appellant would be brought before the jury. We hold that the trial court did not improperly assist the prosecution to obtain a conviction.

The Search Warrant

The Claim that it is a General Warrant

The warrant commanded the search of five persons and "the entire premises 2300 Barclay Street" for lottery slips and related gambling paraphernalia." The five men were particularly described as follows:

> "a c/m/5'8", 40 years, 160 lbs, med. brown complexion, known as First man; c/m/5'10", 45 years, 180 lbs, med. brown complexion known as Second man; c/m/40 years, 5'10", 175 lbs, dark brn. complexion, known as Third man; a w/m/45-50 years, almost bald headed, galsses, 5'10", 215 lbs, herein known as the Fourth man; c/m/5'10", 170 lbs, 30 years, med. brown complexion, known as Fifth man."

The premises were described as "a two-story brick building painted red on front, gray faded on the south side of this corner building. The wood is painted red and green. The first floor formerly housed a grocery store, as is told by the sign over the first floor level, which reads Gerstein's Groceries. The front/side doors are also painted green, wood panels cover part of the front door and windows, apparently as a result of our civil disturbance, as this business is not now operating."

We find that the warrant was not a general one within the contemplation of the constitutional and statutory prohibitions. See *Fleming v. State*, 201 Md. 145; *Webster v. State*, 6 Md. App. 163; *Salmon v. State*, 2 Md. App. 513.

The Claim the Warrant Was Not Issued on Probable Cause

Appellant conceded in argument before us that the affidavit upon which the warrant here was issued showed probable cause for its issuance and we find it clear that it did. This ends our inquiry on the issue. It has been firmly established by and consistently followed in the opinions of the Court of Appeals and this Court that any inquiry as to whether the affidavit upon

which a search warrant was based showed probable cause is confined to the affidavit alone; evidence outside the affidavit, no matter by whom produced or how, is not relevant to the inquiry. *Scarborough v. State,* 3 Md. App. 208, 211-216.

It appears that at Appellant's insistence the trial court received evidence outside the affidavit on the issue of probable cause. Appellant now claims that the clearly established rule of law was thus waived by the trial court and that the validity *vel non* of the warrant must be viewed by us in the light of evidence received. The trial court had no discretion to look outside the affidavit on the issue of probable cause and could not waive the rule. We are not bound on appellate review by its action in this respect. We look only to the affidavit, and as it showed probable cause it supported the issuance of the warrant. We have no need to consider the propriety of the lower court's ruling that the evidence adduced on the issue did not show that the statements made in the affidavit were false. See *Pettiford, et al v. State,* 8 Md. App. 560.

The Evidence Seized

It seems that Appellant objects to the admission of a device, commonly called a "cheesebox", designed to conceal the origin or destination of telephone calls, which was seized under the authority of the warrant. He contends that since it was not described in the warrant its seizure was invalid. The items which the police may reasonably seize under a constitutionally valid warrant and search are not confined to those specifically designated in the warrant if a nexus exists between the item to be seized and criminal behavior. *Crawford v. State,* 9 Md. App. 624, 627; *Anglin v. State,* 1 Md. App. 85, 88-90. We note that such nexus is automatically provided in the case of fruits and instrumentalities of crime and contraband. *Warden v. Hayden,* 387 U.S. 294, 307. The trial court could have properly found a nexus between the "cheesebox" and the criminal behavior charged. We hold there was no error in admitting the item in evidence. Other contentions as to the

seizure of the evidence seem to be predicated upon the validity of the warrant and the legality of its commands. As we have found it legal these contentions fail.

The Arrest

Appellant argues that his arrest was illegal even if the warrant was valid. It follows, he urges, that a search of him incident to the arrest, was not reasonable, and what was taken from him should not have been admitted in evidence. The warrant commanded the arrest upon execution of the warrant of all those persons then and there engaged in the commission of a crime. When the police entered the premises and searched under the authority of the warrant it was plain that offenses proscribed by the lottery laws were being committed in their presence. The court would not be clearly wrong in determining that Appellant's being on the premises was more than mere presence and that in the circumstances, including his attempted flight, he was participating in the illegal activities. We hold that his arrest was legal. See *Salmon v. State, supra.*

Pre-Trial Motions

On 3 February 1969 Francis S. Brocata entered his appearance as counsel for Appellant and on 25 February a 30 day postponement was granted so counsel could file preliminary motions. On 31 March Appellant filed a motion for bill of particulars; a motion for discovery and inspection, a motion for discovery and inspection "with respect to electronic interception and eavesdropping," and a motion for disclosure of witnesses on whose evidence the indictments were based. On 11 April the State answered the motions and on 21 April exceptions were filed to the answers on the motion for discovery and inspection and on the demand for particulars. On 14 May the motion for discovery and inspection and the motion for bill of particulars and the exceptions to the State's answers thereto were withdrawn. The motion for disclosure of witnesses was withdrawn. The motion for discovery and inspection with

respect to electronic interception and eavesdropping was overruled. On 15 May pleas of not guilty were withdrawn and pleas of *nolo contendere* were submitted. Acceptance was held *sub curia*. Appellant was released on bail previously taken. On 13 November the pleas of *nolo* were withdrawn and by motion made and granted in open court the appearance of defense counsel was withdrawn. On 20 November, trial having been set for 1 December, appearance of David S. Harris was entered for Appellant. Appellant was again arraigned and entered pleas of not guilty. Motion to stay proceedings was made, heard and denied. A motion to dismiss the indictments was made; the docket entries do not reflect any action thereon. On 9 December the appearance of David A. Gomborov as co-counsel to represent Appellant was filed. The same day a number of other motions were filed. A motion to stay the proceedings was declared moot as having been previously overruled by the court. An affidavit for removal was made and denied. A motion to dismiss the indictment on the same ground as that made on 20 November was made and disposition held *sub curia*. A motion for bill of particulars, a motion for discovery and inspection, a motion for discovery and inspection with respect to electronic interception and eavesdropping, a motion for disclosure of witnesses, all the same as previously made, were filed. The same day the State filed its answers. The case went to trial but before it did the court went on record:

> "Let the record show that after the arraignment the plea and the election of jury trial, the jury was called and arrived in Court. Thereafter, I received from defense counsel a list of multigraph copies or Xerox copies of motions filed by Francis B. Brocato, who was then counsel for the defendant. These motions have remained and the name of Mr. Brocato stricken out and the name of David S. Harris substituted for Brocato's whereever Brocato's name appeared. First is a motion for discovery and inspection with respect to electronic interception or eavesdropping. The next is a motion for a bill of particulars. The next is a motion for suppression of evidence on the ground that the warrant is insufficient. The next is a motion for discovery and

inspection pertaining to a myriad of records, photographs, instruments, documentary evidence. So many things that it is utterly incomprehensible to me. And the next is a motion for disclosure of witnesses. All of these motions according to my information have been submitted many, many months ago before Judge Harris and withdrawn by Mr. Brocato. They all pertain to matters of discovery except for the motion to suppress evidence which challenges the validity of a warrant which I have never seen.

Certainly the motion pertaining to discovery comes much too late. The only comment I can make is that I will endeavor to do what is fair in the course of the trial, but I cannot delay this trial forever. Where counsel filed discovery motions after the jury is in Court and about to be selected, that is the reason it seems to me but I will do what I can at any time during recess, I will direct the State to let you inspect any electronic devices you care to look at. And if you want, you [can] have the names of the witnesses you intend to call to prove your case in chief, * * * ."

It was then the State again filed the answers previously filed to the motions and it was elicited that defense counsel had been aware for weeks of the prior motions and answers and in fact had received copies of the answers previously filed. He said that the prime motion was that on suppression of the evidence on the ground of the validity of the warrant and agreed to adopt the former motions made.

Appellant now intimates that the court erred in refusing to permit new motions to be filed on the day of trial. We find no error in the circumstances. And we note that it does not appear that Appellant affirmatively requested a postponement of the trial on 9 December. The motion to stay proceedings to which Appellant refers in his brief was that made on the ground that a preliminary hearing had not been held.

Sufficiency of the Evidence

Appellant does not present the sufficiency of the evidence as a specific question but refers to it in passing under a topic he calls "The Seizures", dealing primarily with the allegation of the failure to show that he had a proprietory interest in the premises raided. In any event we have no difficulty in determining that the evidence was sufficient to submit the case to the jury as to each offense of which conviction was had. Appellant's presence in the basement, his identification as a participant in the recorded receipt of lottery play, his actions in attempting to destroy the evidence at the time of the raid, his participations in the conversations overheard during the police surveillance, and the evidence recovered from his person met the test of *Williams v. State*, 5 Md. App. 450. The court did not err in overruling motions for judgment of acquittal.

Other Alleged Defects

We have considered the vague allegations made under the heading "Other Defects" in Appellant's brief. To the extent that we are able to ascertain the points Appellant desires to make, we find them to be no grounds for reversal.

JUDGMENTS AFFIRMED;
APPELLANT TO PAY COSTS.

APPENDIX F

(Order denying Petition for Writ of *Certiorari*

Sidney Gerstein v. State of Maryland

In the Court of Appeals of Maryland

Miscellaneous Docket Number 271, September Term, 1970

(Number 41, September Term, 1970, Court of Special Appeals)

ORDER

Upon consideration of the Petition for a Writ of *Certiorari* to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said Petition be, and is hereby, denied.

(SEAL)

/s/ HALL HAMMOND,
Chief Judge

DATE: January 13, 1971

APPENDIX G

(Extract from trial transcript)

(T. 351) (Patent and Laboratory)

Lt. McKay

CROSS-EXAMINATION

Q. Allright. And when you got on the second floor you searched all the rooms, is that correct? A. Yes, sir.

Q. Then did you come back to the first floor? A. Yes, sir.

Q. Well, will you describe what the premises looked like and what is there on the first floor on December 13, 1968? A. Well, the front part of the building used to be a grocery store, with still a few canned goods and stuff on the shelves, very few, it had been hit during the riots, the April riots, and it was all boarded up, and it hasn't been open for business to my recollection since and the windows is all boarded up and everything are in the back, in the next room behind the grocery store it looks like an electronics shop, it had so much electronic equipment back there, all kinds of electronic equipment and then they have another small room there which I saw, didn't have hardly anything in it on the first floor.

Q. That electronic equipment you found in that first room there didn't surprise you as you knew that Mr. Gerstein had patents on certain electronic equipment, isn't that correct? A. I knew he was trying to get patents, I will put it that way.

Q. Well, he had some patents, was applying for others, isn't that correct? A. I didn't know whether he had any patents or not but knew he was applying for them.

Q. This was part of an electronic workshop, wasn't it? A. I couldn't answer that, sir.

Q. Did it appear to you like an electronic workshop? A. I say it appears to be, it appeared to be an electronic shop, yes, it did appear to be.

Q. You weren't surprised to find it there, were you? A. No, sir.

Q. You knew all about it before, didn't you? A. No, sir. Just like what I had heard about him trying to get patents, I knew that I had heard that,yes.

Q. Did you hear anything from the telephone company about the C&P Telephone Company? A. No, sir.

Q. Did Lt. Andrew ever tell you anything about the telephone the C&P Telephone Company, being in terested in Mr. Gerstein's electronic equipment? A. He never said that to me, no sir.

Q. Did he talk to you about it at all? A. He told me that about a case that he had with Mr. Gerstein in reference to an electronic device and that is about all.

Q. And the type of equipment that was in this room was similar to that an electronics workshop. Is that correct? A. Some of it was, yes.

Q. What else was found on the premises? A. Well, like I–

Q. In addition to what you've already testified, was there anything else found on the premises? A. Yes.

Q. What else? A. You might not like my answer but I call it a cheesebox.

Q. What do you mean by a cheesebox? A. Well, it is a, this particular model here I would call a semi-automatic cheesebox, that is what I have to call this one. This particular one.

* * * * * * * *

(T. 502)

CHARLES SCHULZ

DIRECT EXAMINATION

Q. Have you in connection with your capacity with the Bell Laboratory ever been called upon to testify in any court or administrative proceeding? A. Yes, sir.

Q. And where have they been, sir? A. In the State of Rhode Island in a criminal action and in the State of Maryland in an action before the Public Service Commission.

* * * * * * * *

(T. 423)

LT. ANDREW

CROSS-EXAMINATION

Q. You know it is a semi-automatic, don't you, Lieutenant? A. The telephone company can explain that better than I can. I know what it does and what it's used for. But I don't know the parts. I am not a – the telephone company, I know can explain better than I can.

Q. Lieutenant, you know it is a semi-automatic because it was the same box that was in evidence at the Public Service Commission when you were present and it was demonstrated,

when th telephone company was trying to prevent Mr. Gerstein from getting any–

(Mr. Kiel) I object.

(Mr. Gomborov) From getting him the right to do it.

(The Court) Just a moment. I sustain the objection. We aren't going to try a hearing before the Public Service Commission, Mr. Gomborov. The witness has said it is a semi-automatic cheesebox, as he calls it.

* * * * * * *

(Press Knowledge of Multiple Dwelling)

(T. 369) Lt. McKAY

CROSS-EXAMINATION

Q. When you got up to the second floor you described there was a telephone stand in the hallway there, do you know in whose name that phone is listed? A. Yes.

Q. Whose name? A. Henry Bailey.

Q. And he is the person that actually resided on that second floor, isn't it? A. That is true.

Q. And there were full living quarters up there? A. Yes.

* * * * * * *

(T. 189) DETECTIVE ALSTON

CROSS-EXAMINATION

Q. Do you know the name of the man who was also on the premises at that time? A. I was advised that his name was

I think, Henry Bailey, anyway his name, last name was Bailey and reports would verify as to his first name.

Q. From the information that you received, do you know that Henry Bailey was a tenant on the premises? A. After seeing him in the place of the 2300 address and having been advised of his and all, I was told that also he was, that he resided there.

Q. That he was what? A. Resided there.

REDIRECT EXAMINATION

Q. Detective Alston, you indicated that Henry Bailey resided at 2300 Barclay Street, do you know what portion of the premises he occupied, if any? A. I was advised that he lived on the second floor.

* * * * * * *

(T. 196) DETECTIVE ALSTON

CROSS-EXAMINATION

Q. Allright, do you know whether Henry Bailey had access to the whole building?

(Mr. Kiel) Objection.

(The Court) Sustained.

(Mr. Gomborov) We have finished with this witness, Your Honor.

* * * * * * *

(T. 409) LT. ANDREW

CROSS-EXAMINATION

Q. Allright now, was there a telephone in the premises 2300 Barclay Street on December 13, 1968? A. Yes, sir.

Q. And do you know to whom that telephone was listed? A. I'm not sure now, who it was listed to.

Q. Well, didn't you testify that you had checked with the telephone company and ascertained that it was listed, an unlisted phone, listed to Henry Bailey? A. I believe I did, yes, sir, now I believe that I did, there was a man by the name of Bailey living on the second floor and I think I did get that listing on the phone.

Q. And it was an unlisted phone, you recall? A. I think so, yes, sir.

Q. And how did you get that information?

(Mr. Kiel) I object.

(The Court) Well, I will permit it, it is obvious it from the telephone company, it is the only source of such information.

(The Witness) Through the telephone company.

Q. Well did you get this by calling directory service 411 and obtain it? A. I don't believe I did, I usually call the security department of the telephone company and I, also, other people in the telephone company that I can call many people and get a listing for an official investigation.

Q. And how long before you advised and directed Detective Alston who made an investigation, did you obtain this information? A. I don't remember.

Q. Well, was it before you started the investigation? A. I think so, I am sure, I'm sure it was, I very likely gave it to him. I know I gave him the complaint at 2300 and I could give him the listing at that time, I do not remember now.

* * * * * * *

(T. 412) Q. Now you don't recall whether you gave this telephone number in the name of Henry Bailey to Detective Alston at the time that you told him to investigate? A. I do not, I do not remember, I could have did it but I did not remember if I did it or not.

Q. What information did you have in your possession that led you to obtain information from the telephone company on an unlisted telephone number?

(Mr. Kiel) I object.

(The Court) Sustained.

Q. What information led you to believe that a crime was perpetrated so that you obtained an unlisted number which is contrary to the policy of the telephone company to be given out?

(Mr. Kiel) I object, it is introducing matter which is not before the Court.

(The Court) I will sustain the objection for many reasons. First, I do not see the relevance of the matter inquired into. Secondly, it does not fall within the sphere of a direct examination by any stretch of the imagination and thirdly, it assumes that it is contrary to the policy of the telephone company not to give out such information to law enforcement officers, and I am by no means sure that it is a proper assumption. At any rate, the objection is sustained.

(T. 413) Q. Now Lieutenant, as a result of some information you obtained a telephone number that was unlisted, is that correct in this case? A. I obtained a telephone, yes, I had a telephone number.

Q. And you have been at the premises 2300 Barclay Street about three years before that, is that correct?

(Mr. Kiel) Object.

(The Court) Sustained.

(Mr. Gomborov) If Your Honor please, I think we have a right to show that–

(Mr. Kiel) I object to a proffer in open court.

(The Court) I sustain the objection, I am not asking for a reason.

(By Mr. Gomborov) Q. Now Lieutenant, do you know that, or did you believe that there was any illegal operation of any telephone equipment at 2300 Barclay Street at the time you investigated the investigation?

(Mr. Kiel) I object, it's the same question in a different form.

(The Court) Sustained.

Q. What were you looking for when you started the investigation? A. Violation of the lottery laws.

Q. Anything else? A. No, that was, that is what the search and seizure warrant was for, violation of the lottery laws and that is the main thing that I was looking for, and anything, any other paraphernalia that would have been hooked up would be lottery business.

Q. And how, and did you ask Detective Alston or anyone else in your department to make any investigation of Henry Bailey?

(Mr. Kiel) I object.

(The Court) Well, I'll permit this question, overruled. Answer yes or no, Lieutenant. A. No.

Q. Well, if you knew that the phone was listed to him and he resided there, why didn't you investigate him?

(Mr. Kiel) I object.

(The Court) Sustained.

* * * * * * * *

(T. 90-98)

LIEUTENANT ANDREW

DIRECT EXAMINATION

Q. Lt. Andrew, directing your attention to the first of December, 1968, were you instrumental in detailing Detective Alston to the 2300 Block of Barclay Street? A. I was, sir.

Q. And this was based on certain information that you had received? A. Yes, sir.

Q. What, if anything, did you tell Officer Alston when you detailed him? A. That I received a complaint of lottery being carried on on those premises, Gerstein's Grocery Store, located at Barclay and 23rd.

Q. Anything else? A. No, sir, sent him out to watch it . . . to watch the store and/or to watch the location, was no store there.

Q. How did you know that? A. Well, I have been in the place and I have been by it since and saw that it was boarded up.

Q. Did you give the benefit of this knowledge to Officer Alston prior to his going out there? A. No Sir, I did not, I don't remember, I don't think I did.

Q. When were you there before, Officer Andrew? A. I have been –

(Mr. Kiel) I object. (The Court) Sustained.

Q. Can you say for certain that you did not give this information to Officer Alston? A. I don't recall giving him any other information than what the complaint that I got at my home and that was a lottery business being carried out at that location and I told him to go out and watch it and that is all that I gave him.

Q. How did you get the complaint at home, Lt. Andrew?

(Mr. Kiel) Objection. (The Court) Sustained.

Q. Did you advise Officer Alston as to the description of Sidney Gerstein? A. No, Sir.

Q. Did you give him any information subsequent to his making his observations but prior to making his affidavit?

(Mr. Kiel) I object.

Q. Your testimony, if I understand it, is you just told Officer Alston to go to 2300 Block of Barclay Street and observe Gerstein's Grocery Store? A. That is right.

Q. After that time but before application was made to Judge Carter in this case, did you have conversation with

Officer Alston? A. Regarding the affidavit that he was to make out, or is that what you mean about what he saw or heard at that location . . . no sir, I did not.

Q. Did you read his report? A. I don't think I did before it was signed by the judge, I don't believe I did.

(The Court) You mean before the warrant was issued? You don't believe you read it before the warrant was issued? A. Yes, Your Honor.

(Mr. Kiel) I would simply note for the record that throughout the course of this examination Mr. Gerstein has been very active in the advice of counsel of what questions to ask.

(The Court) Well, the court noted that, but let's not drag out this record any further with any further comments. What is your next question, Mr. Harris?

Q. Lt. Andrew did you discuss the observations with Officer Alston on a day to day basis? A. Not that I remember, no sir.

Q. Did he report back to you from time to time after you detailed him to the 2300 Barclay Street? A. He could have did that, Your Honor, and in other words he could have come in and I could have said to him I, but I don't recall whether he was getting along all right, whether but that I know when the warrant was gotten so I know that he did have probable cause for the judge to sign it, so –

Q. On what basis did you know that Lieutenant?

(Mr. Kiel) Objection. (The Court) Sustained.

Q. Did he show you the warrant before submission to the Judge? A. No, sir.

Q. He did not show it to you? A. Not that I recall, no, sir.

Q. So that you wouldn't know whether or not he had probable cause in that warrant and application or not, would you? A. No, I didn't know it but I knew if the judge signed it and I knew the judge did sign it and if he signed it it had to be probable cause in there.

Q. Lt. Andrew, you remember testifying in the United States District Court for the District of Maryland before His Honor Judge Dorsey Watkins on May 12, 1969? A. I remember, yes, sir.

Q. Page number 12: "QUESTION, - Well, Patrolman Alston, whom you have directed to make the surveillance was making this surveillance and would he report back to you from time to time?" Your answer was: ANSWER, "Yes, always when I gave a man a complaint I would ask him how he is making out, what he sees and that is about as much as I go into it. And when he gets enough probable cause to secure a search warrant I tell them then to go ahead, I don't always read the search warrant. Sometimes I do and sometimes I don't." You remember that question? A. That is correct.

Q. QUESTION "Patrolman Alston was acting under your supervision?" ANSWER, "Yes, sir." QUESTION, "Now you say sometimes you do review those applications for search warrants?" ANSWER, "Yes, sir." QUESTION, "Where are they typed?" ANSWER, "Where are they typed?" QUESTION, "Yes." ANSWER, "Right in our office."

Q. Now do you wish to change your testimony today? A. No, sir, I do not.

Q. All right. You may go on to say, page 13:–

(The Court) What proceeding is this?

(Mr. Harris) This is at a proceeding before Judge Watkins, if your Honor please, for suppression of evidence in a Federal case as a result of this particular raid.

Q. You then go on to say: "I would sometimes, if a man wants to get a search warrant and seizure warrant without me knowing about it, that is perfectly all right with me and when he gets ready to go out on the raid if he wants me to go with him he can tell me when we get into the car where we are going and nobody gets out of the case, Your Honor, because that would be no tip-off as far as I'm concerned." QUESTION, "But in this case the officer started it at your direction?" ANSWER, "That is right." QUESTION, "And you saw this application for warrant before it was submitted to the judge, didn't you?", and your answer is: ANSWER, "Yes sir." QUESTION, "Patrolman Alston gave it to you for your review?" ANSWER, "Yes, I'm pretty sure he did, I don't know if I read it all or not, but I believe that I did look at the application." A. Well, I do not remember whether I read that application or affidavit before or not, I do not remember reading it.

Q. Was your testimony before Watkins on May 13, Lt. Andrew, incorrect?

(Mr. Kiel) I object. (The Court) Sustained, obviously it is not material . . . I hear no material conflict go ahead.

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(Voice identification improbability)

(T. 241-243) LIEUTENANT MC KAY

DIRECT EXAMINATION

Q. Now Lieutenant, are you able to say the total time that you had conversation with Mr. Gerstein? A. The total

time? .... Well, I would have to answer that by saying several times, I don't know exactly how many times.

Q. And you estimate, recognizing the difficulty, but can estimate the length of those conversations at all, Lieutenant? A. Well, back in 1962 I made a raid there.

(Mr. Gomborov) I object.

(Mr. Kiel) Lieutenant, you need not tell us.

(Mr. Gomborov) I move that be stricken.

(The Court) Yes, strike that, the jury will disregard reference.

(Mr. Gomborov) I think it might be serious enough for a mistrial, Your Honor.

(The Court) Oh, I think not, you move for a mis-trial? (Mr. Gomborov) Yes.

(The Court) I will deny the motion. The jury will disregard the reference the Lieutenant just made to how he happened to be talking to the Defendant, but the question is how long did you talk to him on that occasion and don't repeat the occasion Lieutenant.

(The Witness) Well, I have talked to him quite a bit on a few occasions.

Q. (Mr. Kiel) All right. And, Lieutenant are you able at all to estimate the number of minutes you have engaged in conversation with Mr. Gerstein? A. That would be hard to do. Altogether, it wouldn't be no more than an hour.

Q. And over what period of time does this conversation span, Lieutenant, or these conversations? A. Well, I would say from '62 until the present.

Q. And during that period of time Lieutenant, have you ever spoken with Mr. Gerstein on the telephone? A. On the telephone? No.

CROSS EXAMINATION

(T. 335 et seq.)

Well, before December 13, 1968, how many times did you hear Mr. Gerstein's voice? A. When I met Mr. Gerstein at his place of business.

Q. I only asked you how many times you met him? A. I say about four or five times during that period.

Q. From 1962 to December 13, 1968? A. No, during 1962, I am speaking now of about four or five times during 1962.

Q. And then what was the next date thereafter that you heard his voice? A. I met a couple of times.

Q. I only asked you for the date, Lieutenant? A. Oh, I can't give you the dates.

Q. About what year or how many years later? A. It was the closest I could get to that, would be between 1962 and 1968.

Q. What time in 1968? A. Several time I met Mr. Gerstein and we spoke.

Q. Wait a minute, from 1962, in 1962 you heard his voice four or five times, is that correct? A. In 1962, yes.

Q. And then from 1962 to December 13, 1968 you heard him two or three times? A. Several times.

Q. How much is several. A. Well, I would say from eight to a dozen times.

Q. Oh, that is several times? A. Yes.

Q. So that from 1962, eliminating the four or five in 1962 and until December 13, 1968 you spoke to him eight times. A. From eight to a dozen times, yes.

Q. And was that always in person? A. Yes sir.

Q. Did you ever hear his voice over the telephone? A. Not to the best of my recollection, no.

Q. Did you ever hear his voice over any electronic device before December 13, 1968? A. No.

Q. Are you, do you consider that you are, that you qualify as an expert on voices?

(Mr. Kiel) Objection. (The Court) Is that your question? (Mr. Gomborov) Yes, sir.

(The Court) The objection is sustained. This isn't a matter of expert testimony, this is a matter of factual testimony it seems to me and I don't know just what you mean by voices. By voices, you speaking about the acoustical effects the voice of the physical function of the larynx.

(Mr. Gomborov) I am saying, can you recognize a voice, having heard over a period of seven years.

(The Court) Now you are getting down to the question I will permit or one of similar import.

Q. (Mr. Gomborov) During the period of approximately six to seven years that you spoke to Mr. Gerstein from 1962 to 1968 what was the total length of time that you heard him

speak? A. Well, like I said before if you added it all up I would say it would be about an hour.

Q. And are you telling this jury that over a period of seven or six years of hearing someone for a total of an hour, not on any electronic device or telephone or anything of that type that you can definitely identify his voice on a tape recorder? A. Yes.

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(Location of Non-Operating Invention)
(T. 359-362)

LIEUTENANT MC KAY

CROSS EXAMINATION

Q. Where was the alleged cheesebox on the premises when you located it? A. Well, I didn't recover it, Lt. Andrew recovered it.

Q. Did you see it at any time on the premises? A. Yes.

Q. Where was it on the premises? A. It was in on in that second room.

Q. In what second room? A. The second room that I just described to you in down on the first floor, you have the grocery store and you have the next room, the second room, the middle room.

Q. It was in the room behind the workshop, is that right? A. The room behind where the grocery store used to be the front room was a grocery store.

Q. And then the next room is the workshop?

(The Court) Well, see you and he don't agree on whether it was a workshop.

(The Witness) No, I don't exactly call it a workshop.

(The Court) Is that where the electronic gear was found?

(The Witness) It was found in the back room.

(The Court) Oh, where was the cheesebox found in the or the middle room. A. The cheesebox, Your Honor, is what I am talking about, found in the back room.

(The Court) Where was the electronic gear? A. It is the same thing, I called the electronic device and what, the real name that I would call it would be a semi-automatic cheesebox.

(The Court) Oh, what was in the middle room, the one directly behind the grocery store? A. Your Honor there is two rooms in the back of that store and I don't want to be wrong but it seems to me that the second room, the first room behind the grocery store, was a room where I call like an electronics shop but it could have been that back room could be, of those two rooms, may have it just reversed, there is two rooms back there and I can't say definite which room comes first.

(The Court) All right. A. But I know it was one of the back rooms that had the equipment in it.

Q. (Mr. Gomborov) When you first saw this, what you call a cheesebox in the back room, where was it? A. It was on a shelf.

Q. It was on a shelf exposed? A. It was in the case, like it looked like a suitcase until I examined it a little closer.

Q. It was in a suitcase? A. No, it was in the cover part of it, the outside part of it, it looks like a suitcase until you examine it and then it looks like, then you find what it really is.

Q. Well, then was there something wrapped around it? A. No, it is kind of a case like it was in a case.

Q. Well, it was sitting in something like that you mean? A. Not the top on, more like the bottom one.

Q. I see. So it was in some sort of a suitcase or carrying case. Is that right? A. Yes, sir.

Q. Was it hooked up to anything? A. Not to the best of my knowledge, no.

Q. Was it in operation of any type? A. I won't say, I couldn't say that.

Q. Was it removed from the premises? A. Yes, sir.

Q. Why? A. Well, we know they are being used in gambling operations and we took it, we figure it is lottery paraphernalia, we know it has been used before in the lottery business.

Q. Have you evidence that this specific cheesebox was used in connection with any crime?

(Mr. Kiel) Objection. (The Court) Sustained.

Q. Do you know of any other use of this cheesebox in a crime?

(Mr. Kiel) Objection. (The Court) Well, having permitted him to describe what a cheesebox is and what its use is, I think I must overrule this objection.

(Mr. Kiel) If the Court please, I would like to be heard on that very briefly, the uses to which a device can be put on matters for electronic competence. (The Court) Yes, wouldn't be fair to permit the Lieutenant to say what criminal activities may be pursued by means of this device, whereas the question now is what lawful activities may be pursued, is that what your trying to do –

(Mr. Gomborov) Yes. (The Court) I think its unfair to exclude it, I will overrule the objection. Are you able to answer that question Lieutenant? A. Your Honor, I think I'm not that familiar with those machines. I think it would be better if you would ask one of the experts.

Q. (Mr. Gomborov) So that you were saying that the only knowledge you have of the use of this type of electronic equipment is for illegal purposes? A. No sir, I wouldn't say that, I wouldn't say that.

Q. Then what legal purposes can you use it? A. Well I am pretty sure it is, you can revert a call from one place to another so I imagine a businessman could use it if he was going out somewhere and he wanted to be called at a certain time and that he could use it, I'm pretty sure, I'm pretty sure it has been used, in fact I have read where they have been used.

Q. I show you a copy, wait a minute, excuse me. I show you a copy of a paper purported to have been put out by the New Jersey Bell Telephone Custom Calling Services, is that correct? A. Yes, sir.

Q. And on that, on the second page, thereof, they talk about three way calling, isn't that correct? A. Yes, sir.

Q. And they show a man making a call to a lady purportedly his secretary? A. Yes, sir.

Q. And she is relaying that call to a third party, another man? A. Yes, sir.

(Mr. Kiel) I object to that.

(Mr. Gomborov) I don't know what you can do.

(The Court) Mr. Gomborov, it seems to me that you are going pretty far afield with this witness, he is not the man who is familiar with the operations of cheeseboxes in general, you asked him to describe what he found and what it is and I permitted it. Now were going far up into New Jersey, into the catalogue of these cheeseboxes, whatever they are and this is not within this sphere or ken or knowledge of this witness.

(Mr. Gomborov) Well, I think, Your Honor, if the witness testified that he seized it because it was used for illegal purposes, an electronic device that was in a closed case, not hooked up to anything, that the proper question is if were *per se* only be able to be used for some illegal purpose, then I can understand them seizing that equipment, but if it is a piece of equipment that can be used for many legal purposes and might be used by some people for –

(The Court) Well, our witness has said he understood it could be used for a legal purpose, a man could refer a call, and a businessman can defer it to another place but why must we go through the catalogue of the cheesebox?

Q. (Mr. Gomborov) December 13, 1968 what happened to that electronic device that was in that case in the back room?

(Mr. Kiel) I object. (The Court) That electronic device?

(Mr. Gomborov) That we have been discussing.

(The Court) You mean the cheesebox?

(Mr. Gomborov) That he calls the cheesebox.

(The Court) I will overrule the objection, what happened to it? A. It was seized by Lieutenant Andrew along with the other evidence.

Q. (Mr. Gomborov) And do you know what happened to it after he seized it? A. I saw the lieutenant with the cheesebox and the next time I saw it I saw him enter our office with the cheesebox.

Q. And have you seen the cheesebox at any time thereafter? A. Yes.

Q. Where? A. At the hearing at the Federal court and also at the State court.

Q. And have you, do you know where the cheesebox as to location from the time that it left 2300 Barclay Street until now? A. No sir, I didn't have anything to do with taking it out of the property room. I don't know anything about it, the only time that I saw it was when I had the hearing in Federal court, the other hearing at the State court and the day of the raid when I saw the lieutenant seize it.

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(T. 419-422) LIEUTENANT ANDREW

CROSS EXAMINATION

Q. Now when you walked into that room, what did you see with respect to Exhibit 22B (the invention)?

(The Court) Now perhaps you better tell him what that is, talking about the photograph of the small room? (Mr. Gomborov) Yes.

Q. (Mr. Gomborov) Is this the condition that you saw it? A. Yes sir.

(The Court) Is that the photograph showing the case closed? (Mr. Gomborov) Closed, yes.

(The Witness) Yes, sir.

Q. (Mr. Gomborov) That is how the room was? A. Yes, sir.

Q. Now I show you 22A and on that is there any difference, is there any difference in the two pictures? A. Yes, sir. The box that contained the cheesebox is opened and I opened it.

Q. Was the electronic device that you call the cheesebox hook-up or workable at that time? A. It was not hooked –

(Mr. Kiel) Objection. I object to the term "workable" because I don't see how this witness could ever answer that.

(The Court) Maybe he can, if he can't answer it he can say so. I'll overrule the objection.

(The Witness) It was not hooked up, your Honor, but if it had been hooked up it could have.

(Mr. Gomborov) I object to the rest of the answer. I object to the rest of the answer, and the condition that you saw it then, was it intercepting or doing anything to any telephone company property. A. No . . .

Q. Did you know whether it was operative or not? A. Yes, sir.

Q. And how did you know? A. We took it to the Homdel Lab, the Chesapeake Telephone and I observed it working.

Q. Was there any changes or things added to it when it was working? A. No sir.

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(T. 509) MR. SCHULZ,

DIRECT EXAMINATION

Mr. Schulz, I ask you if you will examine please State's Exhibit Number 21 for identification and ask if you've ever seen that device before? A. Yes sir, I have.

Q. And can you inform the jury of when you have seen that device previously? A. I first saw it when it was brought to the Bell Telephone Laboratory by Lt. Andrew of Baltimore City Police.

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(T. 485-493) MR. ROUSE

CROSS EXAMINATION

Q. You have seen this before, haven't you, this brown grained box that is on the counter? A. Yes sir.

Q. And you saw it at the Public Service Commission hearing?

(Mr. Kiel) Objection. (The Court) Well, I'll permit him to answer that one question, please don't go far afield.

(The Witness) I don't, I don't recall seeing this box, no sir.

Q. (Mr. Gomborov) You don't recall seeing it, did you see one that was similar to that?

(Mr. Kiel) Objection. (The Court) Sustained. I think you have gone as far as you can go.

Q. (Mr. Gomborov) Were plans and diagrams and models of this type of box submitted to the telephone company to your knowledge prior to this raid?

(Mr. Kiel) Objection. (The Court) Prior to the raid?

(Mr. Gomborov) Of December 13, 1968? (The Court) Objection is sustained.

Q. (Mr. Gomborov) Would you tell me why you kept it this box locked and did nothing with it from June of 1969 until August and I think you said around the 25th, I'm not sure of the date, August 29, 1969? A. Why I did nothing with it, I had other cheeseboxes in the office that I have held, we send one, usually try these up to the laboratory at Holmdel, New Jersey, because they like to run tests on them. I neglected to send it. I realized after awhile that I meant to send it, but I realized it, I sent and I had no real reason why I didn't prior to that date, no.

Q. Didn't you know that there was a patent pending on this item? A. No sir.

Q. Did you not know there was a patent pending on this item? A. No sir, not on this item.

Q. Were you present at the Public Service Commission when this was described as being patented applied for?

(Mr. Kiel) Objection. (The Court) Sustained, I think you're going too far.

(Mr. Gomborov) I think we have a right to test the veracity of the witness.

(The Court) I think, let's confine ourselves to the subject matter.

Q. (Mr. Gomborov) Wasn't this type of box submitted to the Bell Laboratory either in Baltimore or in Holmdel for examination?

(Mr. Kiel) Objection. (The Court) The type?

(Mr. Gomborov) The type similar to the box that is in the brown grained box.

(The Court) I will sustain the objection.

Q. (Mr. Gomborov) Do you remember submitting an affidavit relative to a box of this similar type to this in the brown grained box?

(Mr. Kiel) Objection. (The Court) When, was it the purpose of this, what is the purpose of this.

(Mr. Gomborov) The purpose of it is to show that at that time that he did not say that there was anything that was illegal about the box *per se.*

(The Court) What time?

(Mr. Gomborov) I will give you the time, if Your Honor please. The adffidavit is dated the 2nd day of November, 1967.

(The Court) I will sustain the objection. Far too remote to the issues in this case and seems to me. What is or is not legal is more often then not relative as we know relative to other factors. Sustain the objection. I am not asking for reasons.

Q. (Mr. Gomborov) Did you request Lt. Andrew to turn over this box to you in June of 1969? A.I don't recall requesting it, I guess it was to be, I guess, I don't know, I don't recall requesting it.

Q. Well, how did you get possession of the box? A. Your Honor, I wish I could just talk to somebody, I don't know whether to answer that, I don't want to – I can answer it very easily but don't –

(Mr. Gomborov) Whatever your answer is, that is the answer.

(Mr. Kiel) Well, I have a feeling what Mr. Rouse is gropping for and does not wish to inject into the trial any prejudicial matter and I would suggest that the Court hear the answer to the question *in camera* and decide whether or not the question can be answered and openly.

(Mr. Gomborov) I request that the question be answered.

(BENCH CONFERENCE – OFF RECORD)

(The Court) Counsel have agreed, at least the Defendant's counsel insisted you answer the question regardless of what the answer may be, so answer it, Mr. Rouse. A. It was given to me, if I remember correctly, by one of the Assistant States Attorneys, following another action that this was discussed –

(The Court) By some other Court proceeding? A. Yes sir.

(The Court) I see, that is how you got it? A. That is how I got it.

(Mr. Gomborov) I ask the court strike his remark, that was not the Defendant's –

(The Court) I think it was, that is the tenor of it, you may proceed – you may pursue the inquiry Mr. Gomborov, I will not strike out my question.

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(T. 43) **(Search Warrant Argument)**

(The Court) . . . what are your objections to the warrant, the admissibility of it?

(Mr. Harris) Your Honor, please, it would be our contention that it violates the Fourth Amendment of the Constitution, Article 26 of the Declaration of Rights (Maryland) and Section 551 of Article 27 because it is a general warrant providing for the search of the entire premises of 2300 Barclay Street although we will show that there existed and that we proffer that it was also known to that Baltimore City Police Department that there existed, separated sub-dwelling units on the premises of 2300 Barclay Street. Secondly, that the affidavit for the warrant was under false statement of material facts and thirdly, there be a suppression because things were taken that were not described as material to be searched under this particular warrant.

(The Court) Well, I cannot at this time pass on the third point because whatever was taken is not before me, but the first two points are in order. The first of these challenges the form of the warrant really? A. Yes.

(The Court) You contend that it does not comply with Section 551 of Article 27. I cannot agree with that. I find that as to form it is sufficient and the allegation in it, in the affidavit of Officer Alston are sufficient, and as a matter of fact and a matter of law, to have warranted Judge Carter in issuing the warrant . . . Now the other point you make is that there are false statements of facts here. Let me see before, I leave the first point, certainly under the authority of the *Fry* case, 3 Md. Ap. 38, makes it abundantly clear I think that the description of the premises is more than adequate. The

premises described . . I think that formally more than an adequate probable cause was shown for the issuance of the warrant in full and literal compliance with the requirements of the statute. Now the other question about there being a falsehood in the application is one that you propose to explore, is that correct, Mr. Harris? . . . Now in the *Sessoms* case again in 3 Maryland Appeals, the Court of Special Appeals held of that as immaterial the validity of the warrant and the admissibility of evidence obtained pursuant to it, assuming it is a lawful warrant, but cannot be challenged beyond the four corners of the warrant . . . However, what testimony do you propose to offer to show falsehood in the application, would you like to proffer the testimony at this time?

(Mr. Harris) The testimony that would be proffered on behalf of the Defendant would be the testimony of Mrs. Whitaker that Mr. Gerstein was not on the premises at the time of the observations as contained within the affidavit and in the search warrant. Mrs. Gerstein would so testify that Mr. Gerstein was not at the 2300 block Barclay Street address at the time of the various observations, would also produce the testimony of a Mrs. Daniels who would so testify, a Mr. Wiggins would additionally testify that Mr. Gerstein was not present at 2300 Barclay Street at the time he's alleged to be there within the affidavit.

(The Court) Despite the *Sessoms* decision I am willing to hear some testimony out of the presence of the jury as to what you propose to prove. Call your witness.

(Wherein Detective Alston and other police were questioned concerning the observations).

(T. 105-109) (The Court) Very good, call your next witness.

(Mr. Gomborov) Your Honor, I would like to, if Your Honor please, at the present time we do not have any more witnesses and very frankly we didn't feel that it would be reached at this point. We do have four or five witnesses who I understand will be available promptly at 10 o'clock and we will keep their testimony to a minimum.

(The Court) Now Mr. Gomborov, this morning it was made known to me that the defense challenged a legal validity of the warrant, that it proposed to show that there was perjury, as you put it, or as Mr. Harris puts it, in the application by the officer who applied and I now find that was Detective Alston and that you wanted to put on evidence in support of your intention that the affiant committed perjury.

At that time I was of the impression, and still am, that it is not competent for the trial judge to permit this, but I indicated that I would be disposed to give you every consideration. Promptly after lunch, reconvening of Court, I asked you, asked Mr. Harris, whether he had witnesses, he said he did and when I asked him the names or asked who they were, he obviously didn't know to the Court's observation, what was told by Mr. Gerstein witness by witness. So I am absolutely no effort was made by the defense to have these witnesses here today and I think it is because didn't know about them until Mr. Gerstein told them. Mr. Gerstein was giving you the names of each witness as you revealed it off to the Court.

(Mr. Harris) That is true, your Honor, but I –

(The Court) That being the case, I must insist that you bring in your witnesses now. We still have a couple of more hours to go today and I'm not going to waste that time, must get over this hurdle of the warrant right now.

(Mr. Harris) May we have a few minutes to go to the clerk's office and issue immediate summons?

(The Court) No, to do that would take several hours. I will not permit it. You are prepared I was told to prove this point, you don't have the witnesses here. You either complete your testimony and I will rule or put on your witnesses.

(Mr. Gomborov) If your Honor please, it is apparent to me that the Court desires to continue on with the matter. Can we do this, can we proceed with the matter holding the question of the warrant until tomorrow morning and putting on the witnesses that we intend to get tomorrow.

(The Court) Who is your next witness, Mr. Kiel?

(Mr. Kiel) The State would call Detective Alston.

(The Court) Describe the raid and the evidence seized in the raid? A. That is correct, Your Honor.

(The Court) Then I must pass on the warrant now. I can't wait until tomorrow.

(Mr. Harris) Can we have until 3 o'clock to produce the witnesses?

(The Court) You cannot.

(Mr. Harris) I would just like to state for the record that I am under the information that we will have witnesses to produce who will state that Mr. Gerstein was not on the premises at the time that is described in the warrant and therefore the warrant was received on or was obtained on perjured testimony.

(The Court) Well, you had every opportunity. You had every opportunity to produce those witnesses and to prove that point. You have consumed precisely one and a half hours on futile questioning of police witnesses which does nothing but corroberate what Detective Alston said in his affidavit.

Now, if you have these witnesses you should have had them here in Court today. They were not here. I will now proceed to pass on the admissibility of this warrant in evidence.

I find it is both a matter of law and a matter of fact that the warrant was lawfully obtained and that there was probable cause for it's issuance and I have heard no evidence suggesting any perjury on the part of the affiant even if there were I do not think under the *Sessoms* case that would make difference but that it is my ruling and the warrant will now be considered as State's Exhibit Number 1 and the Court will take a five minute recess and I will ask the clerk at the end of that time to call the jury and you have an exception to the ruling I've just made, I assume you want it. A. Yes.

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(T. 224) **(Chain of Custody Objection)**

(Mr. Gomborov) I object, they haven't proven the chain.

(The Court) Yes, I'm afraid that's what you're going to have to do, Mr. Kiel, is bring in the officers from the property room to testify as to how the room is run and what the record showed there and now you'll have to bring in Sergeant Mellinger upon objection, you'll also have to probably bring in yourself or someone from the State's Attorney's office to supply these links in the chain of custody, the counsel now demands you prove.

(Mr. Kiel) I understand.

(The Court) Which they have a right to do.

(Mr. Kiel) I understand our requirements, Your Honor.

(The Court) So I will give you the opportunity to make the necessary phone calls in order to get on with the trial by taking a recess when you finish with this witness.

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(T. 250-251) **(Court Assists Prosecutor)**

(The Court) Call your witnesses if you have them.

(Mr. Kiel) The State would call the Police Department property officer if he has arrived.

(The Court) Perhaps you would like to talk to him first you have that right.

(Mr. Kiel) I would, Your Honor, but if not at the expense of delaying the trial.

(The Court) Well, I will take a five minute recess for that purpose, no more than that . . . I would suggest that the jury may remain in the box or retire to the jury room as you wish, will you like to remain in the box? All right, well, I don't like to sit on the bench doing nothing so I'll take a five minute recess and reconvene at the end of that time and you may confer with your witness which have the right to do before he takes the stand.

(The Court then recessed)

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(T. 220-221) **(Court Advising)**

DIRECT EXAMINATION

Q. Is there another name for it? A. That is the name that I would use for it, you transmit through it and you receive

through it. So what else could it be but a transmitter and receiver.

Q. We'll call it a transmitter and receiver.

Q. (Mr. Kiel) Lt. McKay, this particular transmitter and receiver can you tell the Court what officer seized this on the day of the raid? A. I think I took that, yes, I seized that.

Q. All right. And can you indicate to the Court –

(The Court) Now, Mr. Kiel, don't leave it in that precarious position.

Q. (Mr. Kiel) Lt. McKay can you describe or explain to the jury where this particular receiver has been since you seized it on the day of the raid. (Wherein followed a series of pertinent questions proving chain of custody.)

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(T. 544-545) MR. SCHULZ

CROSS EXAMINATION

Q. All right now, so that the telephone company could get the origin and destination of each one of these calls, is that correct? A. Yes sir.

Q. Before – right. And do you make it or does the telephone company of checking the origin and destination of local calls? A. We have the ability to, sir. we don't make it a habit.

Q. You don't make it a habit. This Exhibit 21 can be operated with one phone too, can't it? A. Yes, sir.

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(T. 565-568) (Motions at Close of State's Case)

(The Court) Any motions? So many motions have been filed by the Defendant in this case that I can only hope I have passed on all of them, by the time I get through. The only one that I am aware of which antedated the beginning of the trial is the motion to dismiss the indictment which was filed several days ago when filed I would announce the practice of the Court of Special Appeals and not pass on it at that time. The essential reasons assigned to in support of this motion is that the trial should not proceed since the Defendant was not given a preliminary hearing in Municipal Court. I did not, I did not agree with that point made by Mr. Harris at that time. I announced I would make the ruling after the trial began. I now overrule the motion.

I might point out that the evidence in this case adduced by the State I think is illustrative of the folly of the proposition that every person accused of crime is entitled to preliminary hearing in Municipal Court. Much of the evidence was of a demonstrative nature and its production has consumed most of four days, be utterly impractical to me, I think impossible, to conduct a preliminary hearing in Municipal Court of a case of this nature.

Then a motion to stay the proceedings was filed by Mr. Harris and in the trial that motion was denied, it was refiled the same form after the trial began and I noted it was moot and if there is any doubt about it, I overrule it again.

I believe all motions I have passed on or have been withdrawn I now have in my hand which was filed at the end of the State's case, am I correct in that counsel?

(Mr. Gomborov) Yes, as far as I can remember there is no motion that has not been ruled on. Withdrawn?

(The Court) Well, there were a number of motions had been filed by your predecessor which were withdrawn, they you are bound by that action of course. Then you've refined a whole lot of other motions including some of them which had previously withdrawn.

(Mr. Harris) That's true.

(The Court) I think our motions have been passed on but if there is any doubt about it, I will overrule them all, you have an exception. I say that because of the fact that it is a fatal defect for the trial judge to overlook a motion. I am having trouble here because of the volume and plethora of motions that have been filed, to avoid re-trial I think I passed on them all. If I haven't I –

(Mr. Gomborov) I take specific exception to the reason the Court assign that the motions were filed.

(The Court) What is that?

(Mr. Gomborov) To avoid trial.

(The Court) Oh, I didn't mean to imply anything malicious about it, I just say the effect of the motion, except for the motions to dismiss is to avoid the trial.

(Mr. Gomborov) Delay to coming to trial.

(The Court) Delay coming to trial. Now I have here a motion for judgment of acquittal, let us have a discussion on that. Mr. Kiel are you pressing all those counts?

(Mr. Kiel) Yes, Your Honor, we are.